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2562 ORIGINAL

No. 12104

Docketed

United States
Court of Appeals
for the Ninth Circuit

BEN C. KOEPKE, Individually, and as Area Rent
Director, Los Angeles Defense-Rental Area, Office
of Rent Control, Office of the Housing Expediter,
Appellant,

VS.

J. FONTECCHIO,

Appellee.

Transcript of Record

FILED

Appeal from the United States District Court
for the Southern District of California
Central Division

FEB - 1 1949

PAUL P. O'BRIEN,
CLERK

No. 12104

United States
Court of Appeals
for the Ninth Circuit

BEN C. KOEPKE, Individually, and as Area Rent
Director, Los Angeles Defense-Rental Area. Of-
fice of Rent Control, Office of the Housing Ex-
pediter,

Appellant,

vs.

J. FONTECCHIO,

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Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee:

BENT AND CLAPP,
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Los Angeles 5, California. [1*]

* Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California in
and for the County of Los Angeles

No. 540994

J. FONTECCHIO,

Plaintiff,

vs.

BEN C. KOEPKE, individually, and as Area Rent
Director, Los Angeles Defense-Rental Area,
Office of Rent Control, Office of the Housing
Expediter,

Defendant.

COMPLAINT

(Declaratory Relief and Injunction) and Points
and Authorities

Plaintiff complains of defendant, and alleges:

I.

Since January 1, 1947, plaintiff has been and is now the owner of the real property known as 8012-8014 South Vermont Avenue, Los Angeles, California, and of the various housing accommodations, situated in and upon the same.

II.

Defendant is the duly appointed, qualified and acting Area Rent Director for the Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, an Agency of the United States Government, and has been since July 1, 1947, and now is administering the Housing and Rent Act of 1947, and the rent regulation for controlling rooms in rooming houses and other establishments (12 F.

R. 4302) pursuant to a delegation of authority so to do issued by the Housing Expediter. The real property described in paragraph I is within the territorial limits of the Los Angeles Defense-Rental Area.

III.

On or about March 1, 1947 all of the housing accommodations in and upon the premises above described were vacated by the persons who theretofore had been plaintiff's tenants, and plaintiff proposed to convert said housing accommodations and to use them in [2] the conduct of the business of a motor court. At that time plaintiff consulted with Officials of the Office of Temporary Controls, an agency of the United States then engaged in administering the emergency price control act of 1942 as amended and extended, and was advised by them that it was permissible for him under said act and under the regulations promulgated thereunder to use them in the business of conducting a motor court.

IV.

After receiving this advice from officials of the Office of Temporary Controls plaintiff proceed to, and did convert said housing accommodations and made eight housing units out of what had been four units, so arranging them that half of the units consisted of a bedroom and kitchen, while the other half consisted of a sleeping room only, and in addition, so arranging them that the occupants of each of said units had access to and shares the use of the bathroom. Each of the said units had a separate entrance.

Immediately adjacent to the accommodations is 4,000 square feet of parking space, black topped, and in addition there are five (5) garages on the rear of the lot which can be and are used, as well as the parking space, by guests of the motor court.

The alterations necessary to convert these accommodations and to create additional accommodations by such conversion was commenced after February 1, 1947, and was not completed until approximately October 1, 1947.

Prior to commencing operation as a motor court, affiant purchased a neon sign, reading "Motel", which is placed in front of the property next to that part of the property in which affiant lives and which affiant also uses as the manager's office.

Since October 1, 1947, occupancy of the said units has been almost exclusively transient, thus in October 1947, 40 different guests stayed one day, 4 stayed five days, and 2 stayed six days. In November 1947, 33 stayed one day, 11 stayed two days, 2 stayed [3] three days, 2 stayed four days, 9 stayed five days, and 2 stayed six days.

In December 1947, 25 stayed one day, 16 stayed two days, and 14 stayed five days.

In January 1948, up to January 24, 1948, 42 stayed one day, 8 stayed two days, 1 stayed three days and 12 stayed five days.

Affiant furnishes furniture, linen, soap, and cleans each unit each day.

Affiant operates said accommodations in all respects as any other motor court is operated in Southern California.

Said premises are within the City of Los Angeles and constitute a group of detached buildings containing individual sleeping and living units designed for and used temporarily by automobile tourists and transients, with garage attached and parking space conveniently located to each unit.

V.

On July 1, 1947, the Act and the regulation above referred to in paragraph II became effective and each is still in effect. The Act applied only to controlled housing accommodations and excluded from that category any motor court, or any part thereof. (Sec. 202 (c) (2). The regulation, in identical language, excluded such accommodations from its scope.

VI.

Plaintiff contends that by reason of the foregoing facts said housing accommodations are not subject to the Housing and Rent Act of 1947, nor to any regulations or order issued by the Housing Expeditor, or to any order issued by defendant in the exercise of his delegated authority. Defendant contends that by reason of the foregoing facts said housing accommodations are subject to the Act, and to regulations or orders issued thereunder by the Housing Expeditor or by defendant in the exercise of his delegated authority.

VII.

On January 20, 1948, in proceedings in defendant's office, [4] described as Docket 262021, defendant issued and mailed to plaintiff a notice in writing advis-

ing him that defendant proposed to issue an order fixing maximum rents for the said housing accommodations.

VIII.

On or about January 30, 1948, plaintiff filed objections to the issuance of any such order setting forth the facts pleaded above, and filed also an application for decontrol.

IX.

On February 9, 1948, in the same numbered proceedings, defendant issued and mailed to plaintiff notice in writing advising him that defendant proposed to deny plaintiff's application for decontrol on the ground that the establishment was not considered a motor court on June 30, 1947. Plaintiff objected to the proposed order denying his application for decontrol, stating again the facts pleaded above, but defendant continues to maintain his position that said housing accommodations were not decontrolled by the said Act and proposes to issue said order on the 19th day of February 1948, and has refused to suspend the issuance of said order until such time as the matter can be brought before this court for hearing and decision.

X.

Unless restrained and enjoined therefrom by this court, defendant threatens to and will do the following things:

- (a) Issue an order purportedly fixing a maximum rent for said housing accommodations;
- (b) Direct the commencement and commence an

action against plaintiff to attempt to restrain and enjoin plaintiff from demanding or receiving from the guests in said motor court any amounts in excess of those fixed by defendant's order.

XI.

Defendant's contention in the premises is made at the express direction of the Regional Rent Director, defendant's [5] immediate superior in the Agency, and at the express direction of the Housing Expediter. Plaintiff is informed and believes, and therefore alleges that any request to the Regional Rent Administrator to review defendant's order, or any appeal from defendant's order or from the Regional Rent Administrator's order on review of defendant's order, to the Housing Expediter, or to the Acting Housing Expediter would be of no avail and would result in the affirmance by them of defendant's order. In any event, it is and has been the policy of the Housing Expediter, that, even in the event of reversal of an Area Rent Director's order, the order of reversal takes effect only upon its issuance. As a result of this policy plaintiff would still be required to make a refund, or be subject to treble damage liability from the date of the issuance of said order and thereafter until the issuance of the reversing order if plaintiff did not voluntarily abandon the collection of the rent agreed to be paid by his tenants. Plaintiff is informed and believes, and therefore alleges that if said order issued as proposed the guests of said housing accommodations would refuse to pay rent in excess of the amount specified therein and it would

become necessary for plaintiff to bring successive actions at law to recover the rents to which he is and will be entitled, or to bring successive actions in unlawful detainer to evict the present guests of said housing accommodations, or future guests of said housing accommodations, for non-payment of rent, and in each of said actions each of said guests would contend that said order issued by defendant was valid and prevented a recovery by plaintiff in such actions.

XII.

Plaintiff is collecting rentals from guests of said housing accommodations at the rate of approximately \$35.00 per day, and if said order is issued it will purport to reduce the amounts which plaintiff may lawfully charge and collect from said [6] guests to approximately \$12.00 per day, and by the issuance of said order plaintiff will suffer irreparable injury.

Wherefore, plaintiff prays judgment as follows:

(1) That a temporary restraining order, and a preliminary and final injunction issue restraining and enjoining defendant, his agents, servants and employees, and all persons acting in concert with him from issuing or purporting to issue the proposed or any order fixing or purporting to fix a maximum rent for housing accommodations located 8012-8014 South Vermont Avenue, Los Angeles, California, and from making or purporting to make any order effective to establish a maximum rent for said housing accommodations, and from doing any act, by commencing or directing the commencement of any action to, or taking any proceedings looking toward, compulsion

of plaintiff to make any refund to any guest of said housing accommodations on account of occupancy thereof by such guests, or requiring plaintiff to comply with any such order with respect to said housing accommodations, and from taking any other or proceeding, or doing any act to enforce any such order;

(2) That an Order to Show Cause issue ordering defendant to show cause, if any he has, at a date, place and time fixed by the court, why a preliminary injunction should not issue against him restraining him during the pendency of this action from doing any of the acts specified in (1) above;

(3) That this court declare the respective rights and duties of the parties hereto under the Act and regulations with respect to housing accommodations known as 8012-8014 South Vermont Avenue, Los Angeles, California, and particularly that this court declare that defendant has no power, authority or jurisdiction to issue any order of any kind with respect thereto:

(4) For plaintiff's costs of suit herein; and

(5) For such other and further relief as may to the court [7] seem meet and just in the premises.

BENT AND CLAPP,
By AUSTIN CLAPP,
Attorneys for Plaintiff.

POINTS AND AUTHORITIES

The statute itself excludes from the category of controlling housing accommodations, and consequently from its application, any motor court, or any part thereof.

Housing and Rent Act of 1947, Pub. L. 129, 80th Cong., Sec. 202 (c) (3) (b).

The prohibitions of the Act, and the regulation of evictions thereunder, expressly relate only to "Controlled" housing accommodations.

Housing and Rent Act of 1947, Secs. 204 (b), 206 (a), 209 (a).

The Housing Expediter's authority (and necessarily that of his subordinates) is expressly limited to regulations and orders "consistent" with the Act.

Housing and Rent Act of 1947, Sec. 204 (d).

An injunction may be granted against a public officer when it appears that the officer is acting illegally.

Brock v. Superior Court, 11 Cal. (2d) 682, 81 Pac. (2d) 931.

Loftis v. Superior Court, 25 Cal. App. (2d) 346, 77 Pac. (2d) 491.

And a temporary injunction may be granted under such circumstances.

Agricultural Prorate Commission v. Superior Court, 31 Cal. App. (2d) 518, 88 Pac. (2d) 253.

Where it is apparent that resort to administrative remedies would be useless, an action for injunction is not [8] premature because of failure to resort to such remedies.

Cammeren v. Fresno, 51 Cal. App. (2d) 235, 124 Pac. (2d) 621.

A Fortiori, this is so, where the reviewing body has no more jurisdiction than the inferior agency.

Where an agent of the Government acts without

authority . . . he ceases to act in an official capacity and a suit against him is not a suit against the Government. . . . It follows that the exemption of the Government from suit does not exempt or protect its officers from being sued when they are proceeding without authority . . .

Oklahoma v. Guy F. Atkinson Co., et al., 37 F. S. 93, at pages 96; affirmed 313 U. S. 508, 61 S. Ct. 1050, 85 L. Ed. 1487.

State of California,
County of Los Angeles—ss.

J. Fontecchio being by me first duly sworn, deposes and says: that he is the plaintiff in the above-entitled proceeding that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon—information or belief, and as to those matters that he believes it to be true.

J. FONTECCHIO.

Subscribed and sworn to before me this 19th day of February, 1948.

[Seal] AUSTIN CLAPP,
Notary Public in and for said County and State
of California.

Filed Feb. 19, 1948.

[Endorsed]: Filed Mar. 26, 1948. [9]

In the District Court of the United States, Southern
District of California, Central Division

No. 8078—PH

J. FONTECCHIO,

Plaintiff,

vs.

BEN C. KOEPKE, Individually, and as Area Rent
Director, Los Angeles Defense-Rental Area, Of-
fice of Rent Control, Office of the Housing Ex-
pediter,

Defendant.

ANSWER

Comes now the defendant and for answer denies,
admits and alleges as follows:

I.

Basing his denial on lack of information and belief, defendant denies all of the allegations of Paragraph I of the complaint, except that defendant alleges that plaintiff has dealt with the Office of the Housing Expediter at Los Angeles as landlord of the housing accommodations located at 8012 to 8014 South Vermont Avenue, Los Angeles, California, and that on October 14, 1947, the plaintiff filed a Certificate of Registration with the Office of the Housing Expediter for housing accommodations located at said address on the form provided by the Office of the Housing Expediter for housing accommodations subject to the Rent Regulation for Controlled Rooms in Rooming Houses and other establishment; [19] and except that defendant al-

leges that at other times plaintiff has filed a Certificates of Registration with the Office of the Housing Expediter at Los Angeles on the form provided by said Office for accommodations subject to the Rent Regulations for Controlled Housing, said registration certificates relating to the housing accommodations located at 8012, 8012 $\frac{1}{4}$, 8012 $\frac{1}{2}$, 8012 $\frac{3}{4}$, 8012 $\frac{7}{8}$, 8014, 8014 $\frac{1}{4}$, 8014 $\frac{1}{2}$, 8014 $\frac{3}{4}$ South Vermont Avenue, Los Angeles, California.

II.

Answering Paragraph II of the complaint, defendant admits that he is the duly appointed, qualified and functioning Area Rent Director of the Los Angeles Defense Rental Area, Office of the Housing Expediter, an instrumentality of the United States, authorized by the Housing and Rent Acts of 1947 and 1948. Defendant admits that he has been since July 1, 1947, and now is administering the Housing and Rent Acts of 1947 and 1948 and the Controlled Housing Regulation and the Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments as issued and amended pursuant to said Acts in said defense rental area but alleges that he is administering said acts and regulations only to the extent that he is authorized to do so by the rent and procedural regulations issued pursuant to said acts and the provisions of the manual of operations of the Office of Housing Expediter, particularly Section 12-1600 thereof and pursuant to the provisions of Housing Expediter Rent Control Order No. 1 issued

May 2, 1947, by Housing Expediter Frank Creedon and effective May 4, 1947. Defendant admits that the property described in Paragraph I of the complaint is within the Los Angeles Defense Rental Area. Except as admitted in the foregoing portion of this paragraph the defendant denies all of the allegations of Paragraph II of the complaint.

III.

Answering Paragraph III of the complaint, and basing his denial on lack of information and belief, defendant denies all of the allegations of said paragraph.

IV.

Answering Paragraph IV of the complaint, and basing his denial on lack [20] of information and belief, the defendant denies all of the allegations of said paragraph.

V.

Answering Paragraph V of the complaint, defendant admits that the Housing and Rent Act of 1947 and the Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments became effective July 1, 1947, and are still in effect as amended. Defendant admits that the Housing and Rent Act of 1947 as amended by the Housing and Rent Act of 1948 excluded from controlled housing accommodations those housing accommodations which were motor courts or any part of motor courts on June 30, 1947. Defendant admits that the Controlled Housing Rent Regulation does

not apply to housing accommodations in establishments which were motor courts on June 30, 1947. Defendant admits that the regulation for controlled rooms in rooming houses and other establishments does not apply to rooms in establishments which were motor courts on June 30, 1947. Except as admitted in the foregoing portion of this paragraph, defendant denies all of the allegations of Paragraph V of the complaint.

VI.

Defendant admits that plaintiff makes the contentions set forth in Paragraph VI of the complaint but defendant denies the contentions thus alleged. To the contrary, the defendant contends that the Housing accommodations described in the complaint are subject to the Housing and Rent Act of 1947, to said Act as amended in 1948, and to said Rent Regulations issued pursuant thereto and any orders issued or which might be issued pursuant to said Regulations. However, defendant denies plaintiff's allegations concerning said housing accommodations except to the extent admitted in the foregoing portions of this Answer. Except as admitted in the foregoing portion of this paragraph defendant denies all of the allegations of Paragraph VI of the complaint.

VII.

Answering Paragraph VII, defendant alleges that on January 20, 1948, under docket No. 262021, defendant issued and mailed to plaintiff a notice

in writing advising him that defendant proposed to issue an order fixing maximum rents for the housing accommodations located at 8012-8014 South Vermont [21] Avenue, Los Angeles, California, described as Room Numbers 1 to 9, inclusive. Except as admitted in the foregoing portions of this paragraph, defendant denies all of the allegations of Paragraph VII of the complaint.

VIII.

Answering Paragraph VIII of the complaint, defendant denies that plaintiff filed objections to the issuance of the proposed order referred to in Paragraph VII of this Answer. Defendant alleges that on February 4, 1948, plaintiff filed an "Application for decontrol of accommodations in hotels and tourist homes" for the housing accommodations at 8012-8014 South Vermont Avenue, Los Angeles, California. Except as admitted in the foregoing portions of this paragraph, defendant denies all of the allegations of Paragraph VIII of the complaint.

IX.

Answering Paragraph IX of the complaint, defendant admits that about February 9, 1948, it mailed to plaintiff a notice in writing advising plaintiff that a preliminary investigation and other available information indicates that all units in the aforesaid housing accommodations are not decontrolled, that if no reply and supporting evidence is filed within ten days, the Rent Director may enter an order setting forth ineligibility for

decontrol. Defendant admits that he continues to contend that said housing accommodations are not decontrolled. Except as admitted in the foregoing portions of this paragraph, defendant denies all of the allegations of Paragraph IX of the complaint.

X.

(a) Answering Sub-paragraph X (a) of the complaint, defendant admits the allegations thereof.

(b) Answering Sub-paragraph X (b) of the complaint, defendant denies all of the allegations thereof.

XI.

Answering Paragraph XI of the complaint, defendant admits that his interpretation of said acts and regulations set forth in the foregoing portions of this Answer is made at the direction of the Housing Expediter. Defendant denies that as a general rule appeals and reviews provided for by Rent Procedural [22] Regulation No. 1 from Rent Director's orders governing individual housing accommodations are of no avail and would result in affirmance of the orders, and alleges the Area Rent Director has been reversed in administrative appeal and review proceedings, but is unable to foresee the action of the Regional Administrator or Housing Expediter should an appeal or review be taken from the order establishing maximum rents which defendant proposes to issue. Basing his denial on lack of information and belief, defendant denies that such order would be affirmed. Defend-

ant denies that in all cases the orders of reversal on administrative appeal or review of a Rent Director's order takes effect only prospectively. Defendant is informed and believes and on such information and belief, alleges that if it should be held on administrative appeal or review that the Rent Director was not entitled on a correct view of the law to issue an order fixing the maximum rent of said housing accommodations, the order of reversal would reverse the Rent Director's order from the date of issuance of the latter order, and in that event plaintiff would be under no legal obligation by reason of the issuance of the order. Defendant lacks sufficient information and belief on which to deny or admit and on that ground denies that by reason of the issuance of the order the tenants of said apartments would refuse to pay rent in excess of the amount specified therein. Defendant lacks sufficient information and belief on which to deny or admit and on that ground denies that because of the issuance of said order it would become necessary for plaintiff to bring successive actions at law to recover the rents to which he is and will be entitled or to bring successive actions in unlawful detainer to evict the present tenants of said housing accommodations, or future tenants of said accommodations for non-payment of rents and that in each of said actions each of said tenants would contend that said order issued by defendant was valid and prevented a recovery by plaintiff in such actions. Except as admitted in the fore-

going portions of the paragraph, defendant denies all of the allegations of Paragraph XI.

XII.

Defendant denies all of the allegations of Paragraph XII of the complaint. [23]

Wherefore, defendant prays that plaintiff take nothing by his complaint and that defendant be permitted to go hence with its costs of suit.

Dated: Los Angeles, California, this 14th day of May, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
BENJAMIN CHAPMAN,
RICHARD G. SOLOF,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Defendant.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 14, 1948. [24]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby moves the Court for summary judgment declaring that the premises described in the complaint are and have been a motor court as defined in the Housing and Rent Acts of 1947 and 1948 since the 1st day of October, 1947, and that

the same are not "controlled housing accommodations" within the meaning of the said Acts.

Plaintiff also moves the Court for an injunction against the defendant, his agents, servants and employees and all persons acting in concert with him from issuing or purporting to issue a proposed or any order fixing or purporting to fix a maximum rent for housing accommodations located at 8012-8014 $\frac{7}{8}$ South Vermont Avenue, Los Angeles, California, and from making or [27] purporting to make any order effective for establishing a maximum rent for said housing accommodations and from doing any act, by commencing or directing the commencement of any action to, or taking any proceedings looking toward, compulsion of plaintiff to make any refund to any guest of said accommodations on account of occupancy thereof by such guests, or requiring plaintiff to comply with any such order with respect to said accommodations, and from taking any other step or proceeding, or doing any act to enforce any such order.

This motion will be made and based upon this motion, upon all the records and files of the above-entitled action and upon the affidavits of J. Fontecchio and Austin Clapp served and filed herewith.

Dated this 27th day of May, 1948.

BENT AND CLAPP,
By /s/ AUSTIN CLAPP,
Attorneys for Plaintiff.

[Endorsed]: Filed May 28, 1948. [28]

[Title of District Court and Cause.]

EXHIBIT No. 1

AFFIDAVIT OF BEN C. KOEPKE IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

I, Ben C. Koepke, having been first duly sworn, depose and say as follows:

That I am Area Rent Director for the Los Angeles Defense Rental Area Office of the Office of the Housing Expediter. As such Area Rent Director it is not within my authority nor within my scope of duties to commence or direct the commencement of action or legal proceedings for the purpose of compelling refund to the tenant or tenants of rent collected in excess of the maximum rent which might be established under any order which I might issue, or for the purpose of restraining the collection of such rents. My authority and scope of my duties in such matters goes only so far as to receive and investigate complaints or information concerning violations of the Housing and Rent Acts and Regulations issued pursuant thereto and in appropriate cases to refer such matters to the Litigation Unit of the Office of the Housing [52] Expediter for their consideration and action. I have no intention of exceeding my authority or the scope of my duties in connection with the housing accommodations involved in this suit.

Dated: Los Angeles, California, this 4th day of June, 1948.

/s/ BEN C. KOEPKE,
Area Rent Director.

Subscribed and sworn to before me this 4th day of June, 1948.

/s/ SAMUEL R. GARB,

Notary Public in and for the State of California,
County of Los Angeles.

My commission expires February 4, 1949.

[Endorsed]: Filed June 4, 1948. [53]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF J. FON-
TECCHIO IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

J. Fontecchio, being first duly sworn, deposes and says:

That on or about the 26th day of May, 1948, three representatives of the Office of the Housing Expediter visited affiant's premises at 8008-8014 $\frac{3}{4}$ South Vermont Avenue in the City and County of Los Angeles, State of California, and inspected the housing accommodations on said premises. Affiant is informed and believes and therefore states that said persons also talked to a number of per-

sons occupying the premises situate in and near affiant's said premises.

On the day following the visit by these three persons [54] one J. E. McCurdy, an employee of the Office of the Housing Expediter, also visited and inspected said premises.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed June 7, 1948. [55]

[Title of District Court and Cause.]

SUPPLEMENTAL AFFIDAVIT OF AUSTIN
CLAPP IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT

State of California,

County of Los Angeles—ss.

Austin Clapp, being first duly sworn, deposes and says:

That Abe I. Levy, Stephen D. Monahan, Frank L. Hirst, Richard G. Solof and Benjamin Chapman are attorneys employed by the Los Angeles office of the Office of the Housing Expediter and are members of the litigation unit of the Los Angeles office of the Office of the Housing Expediter. These attorneys also appear for the defendant Ben C. Koepke in the above-entitled action.

If the defendant Ben C. Koepke were to issue an order fixing maximum rents for the accommodations described in the complaint herein and if any guest of the plaintiff residing in said [58] housing accommodations were to make inquiry of

defendant, his agents, servants and employees relating to the propriety of a charge made by plaintiff to said guest in excess of the amount stated in such order, said complaint of said guest would be referred by defendant to the said attorneys for action.

On May 25, 1948, at the request of affiant, J. E. McCurdy then and there an employee of the Los Angeles office of the Office of the Housing Expediter, examined at affiant's office the registration cards which are referred to and summarized in the affidavit of J. Fontecchio in support of his motion for summary judgment.

/s/ AUSTIN CLAPP.

Subscribed and sworn to before me this 7th day of June, 1948.

/s/ EDMUND L. SMITH,

Clerk of the United States
District Court.

(Acknowledgment of Service.)

[Endorsed]: Filed June 7, 1948. [59]

[Title of Cause.]

Hall, Judge.

MINUTE ORDER

There is no genuine issue as to any material fact. The issues raised are of law only and are resolved in favor of the plaintiff. Accordingly, plaintiff's motion for a Summary Judgment is granted. Plaintiff's counsel will prepare appropriate order and judgment.

[Endorsed]: Filed July 19, 1948. [61]

[Title of District Court and Cause.]

ORDER GRANTING MOTION FOR
SUMMARY JUDGMENT

Plaintiff having filed herein his motion for summary judgment in this cause, and both parties, being represented by counsel, having submitted the motion for decision upon all of the records and files of the above-entitled action, including all the affidavits filed therein, and counsel for both parties having submitted briefs, and the Court having fully considered all of said records, files, affidavits and briefs,

It Is Ordered that there is no genuine issue as to any material fact, that plaintiff's motion for summary judgment is hereby granted, and that judgment be entered accordingly.

Dated: Sept. 13, 1948.

/s/ PEIRSON M. HALL,

United States District Judge.

Dated this 2nd day of September, 1948.

ABE I. LEVY,

STEPHEN D. MONAHAN,

FRANK L. HIRST,

RICHARD G. SOLOF,

By /s/ BENJAMIN CHAPMAN,

Attorneys for Defendant.

BENT AND CLAPP.

By /s/ AUSTIN CLAPP,

Attorneys for Plaintiff.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 14, 1948. [63]

In the District Court of the United States, Southern District of California, Central Division

No. 8078—PH

J. FONTECCHIO,

Plaintiff,

vs.

BEN C. KOEPKE, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter,

Defendant.

JUDGMENT

(For Declaratory Relief and Injunction)

Plaintiff having filed herein his motion for summary judgment in this cause, and both parties, being represented by counsel, having submitted the motion for decision upon all of the records and files of the above-entitled action, including all the affidavits filed therein, and counsel for both parties having submitted briefs, and the Court having fully considered all of said records, files, affidavits and briefs, and plaintiff's said motion having been granted,

It Is Ordered, Adjudged, and Decreed that there is no genuine issue as to any material fact; that on October 1, 1947, and at all times since that date, and at present, the premises hereinafter described were and have been, and are now being, used by plaintiff as a motor court within the meaning of the Housing [64] and Rent Act of 1947, and on and

since said date and at present said premises were not, and have not been, and are not controlled housing accommodations within the meaning of said Act; and that at all times since its effective date the said premises have been and are now being used by plaintiff as a motor court within the meaning of the Housing and Rent Act of 1948, and on and since said date and at present, said premises were not, and have not been, and are not controlled housing accommodations within the meaning of said Act; that the motor court premises above referred to consist of the lot known as 8012-8014 $\frac{3}{4}$ South Vermont Avenue in the City of Los Angeles, County of Los Angeles, State of California, with a one hundred foot frontage on that Avenue and extending one hundred forty-five feet easterly to an alley, together with the buildings and structures thereon, excepting therefrom certain portions of said lot and certain structures thereon described as:

(1) The westerly seventy-five feet of the north fifty feet of said lot which at all times mentioned herein have been and are being used by plaintiff and his son as a used car lot;

(2) The small building in the extreme north easterly corner of said lot which at all times mentioned herein has been and is being used by plaintiff as a real estate office; and

(3) The structures on said lot known as 8012, 8012 $\frac{1}{4}$, and 8014 $\frac{1}{4}$ South Vermont Avenue which at all times mentioned herein have been and are being used as living quarters by Pasquale Fontecchio, plaintiff's father, by Charles Fontecchio, plain-

tiff's son, and by Mary Woody, a tenant of the plaintiff, respectively.

It Is Further Ordered, Adjudged and Decreed that defendant, his agents, servants, and employees, and all persons acting in concert with him be, and they and each of them is hereby, permanently enjoined and restrained from doing, or from attempting to do, directly or indirectly, any of the following acts: [65]

(1) Issuing or purporting to issue the proposed or any order fixing or purporting to fix a maximum rent or rents for the motor court premises, herein described, or for any part thereof;

(2) Claiming or asserting that on October 1, 1947, or at any time since that date there was, or has been, or is a maximum rent for the motor court premises herein described, or for any part thereof;

(3) Taking any step or proceeding tending to or attempting to enforce any order such as is described in subparagraph (1) above or to enforce any claim or assertion such as is described in subparagraph (2) above.

It Is Further Ordered, Adjudged and Decreed that plaintiff have and recover of defendant his costs, taxes in the sum of \$.

Dated: Sept. 13, 1948.

/s/ PIERSON M. HALL,

United States District Judge.

Dated this 2nd day of September, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ BENJAMIN CHAPMAN,
Attorneys for Defendant.

BENT AND CLAPP,

By /s/ AUSTIN CLAPP,
Attorneys for Plaintiff.

Judgment entered Sept. 14, 1948. Docketed Sept.
14, 1948. Jdg. Book 52, Page 705.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 14, 1948. [66]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Ben C. Koepke, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the 9th Circuit, from the order granting motion of the plaintiff for a summary judgment and from the

entire final judgment for declaratory relief and injunction entered in this action on the 14th day of September, 1948.

Dated this 21st day of October, 1948.

ABE I. LEVY,
STEPHEN D. MONAHAN,
FRANK L. HIRST,
RICHARD G. SOLOF,

By /s/ FRANK L. HIRST,
Attorneys for Defendant.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Oct. 21, 1948. [67]

In the United States District Court for the Southern District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 73, inclusive, contain full, true and correct copies of Complaint; Petition for Removal; Order for Removal; Certificate of Clerk of the Superior Court; Affidavit of Tighe E. Woods, Housing Expediter, in Support of Motion to Dismiss; Answer; Motion for Summary Judgment with Supporting Affidavits; Affidavit of Ben C. Koepke in Opposition to Motion for Summary Judgment; Supplemental Affidavits of J. Fontecchio and Austin Clapp in Support of Motion for

Summary Judgment; Minute Order Entered July 19, 1948; Order Granting Motion for Summary Judgment; Judgment; Notice of Appeal; Appellant's Designation of Record on Appeal and Appellee's Designation of Additional Portions of Record on Appeal which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 29th day of November, A.D. 1948.

[Seal] EDMUND L. SMITH,
 Clerk.

[Title of District Court and Cause.]

**AFFIDAVIT OF TIGHE E. WOODS, HOUSING
EXPEDITER, IN SUPPORT OF MOTION
OF DEFENDANT, BEN C. KOEPKE, INDI-
VIDUALLY, AND AS AREA RENT DIREC-
TOR, LOS ANGELES DEFENSE-RENTAL
AREA, OFFICE OF THE HOUSING EXPE-
DITER, TO DISMISS THE COMPLAINT**

Tighe E. Woods, being first duly sworn, deposes and says:

That he is presently the duly appointed, qualified, and acting Housing Expediter of the Office of the Housing Expediter, pursuant to appointment as Acting Housing Expediter by the President of the United States in Executive Order dated November 1, 1947 (12 F.R. 7265), and by appointment during recess of the Senate on December 20, 1947, as Hous-

ing Expediter, that as such official, affiant is now and has been since said date of appointment, administering the powers, functions, and duties under the Housing and Rent Act of 1947 (50 U.S.C. App. Sec. 1881, et seq.), as is provided in Section 204(a) thereof; that his official residence now is and at all [17] times since November 1, 1947, has been in the City of Washington, District of Columbia; that his home is not in the State of California, and he is not an inhabitant thereof.

Affiant further says that at no time has he, as Housing Expediter, been personally served with summons or other process in the above-entitled action; that at no time has a copy of the summons or a copy of the Complaint, either or both, in the within action, been delivered to or left at the usual place of abode of affiant since institution of the within action, and that affiant, since his appointment, has at no time authorized or appointed any person his agent to accept or receive service of summons or other process for or on his behalf, in the within action, or in any other action.

/s/ TIGHE E. WOODS.

Subscribed and sworn to before me this 25th day of March, 1948.

[Seal] /s/ ALBERT C. ALLEN,
Notary Public in and for the City of Washington,
District of Columbia.

My Commission expires 10/31/51.

[Endorsed]: Filed Nov. 30, 1948. [18]

[Title of District Court and Cause.]

AFFIDAVIT OF J. FONTECCHIO IN SUP-
PORT OF MOTION FOR SUMMARY
JUDGMENT

State of California,
County of Los Angeles—ss.

J. Fontecchio, being first duly sworn, deposes and says:

That if I were called as a witness at the trial of the above-entitled action, I would testify as follows:

In 1936 affiant purchased in the names of himself and Sarah Fontecchio, his wife, the real property known as 8008-8014 $\frac{3}{4}$ South Vermont Avenue in the City of Los Angeles, County of Los Angeles, State of California; at the time of said purchase there were and ever since that time there have been and there now are certain buildings situated on said premises.

The property above described consists of a lot on the [29] east side of Vermont Avenue with a one hundred foot frontage on that Avenue extending one hundred forty-five feet easterly to an alley. The westerly seventy-five feet of the north fifty feet of this lot is used by affiant and his sons as a used car lot. The easterly seventy feet of the northerly half of this lot is separated from the used car lot by a fence and is black-topped with the exception of the space occupied by a small building and two garages in the extreme northeasterly corner of the

lot. This building is presently being used by affiant as a real estate office and the garages and the black-topped area are used as a parking space for the motor court accommodations hereinafter described. Prior to March 1, 1947, there were on the south fifty feet of this lot five buildings which were being used as housing accommodations. Four of these buildings were duplexes, each containing two separate housing units while the fifth building, on the extreme easterly end of this portion of the lot was a separate housing accommodation consisting of bedroom, kitchen and bath. In the extreme southeasterly corner of the lot were located three garages opening upon the alley to the east of the premises.

The housing accommodations in the five buildings above described were prior to March 1, 1947, numbered and designated as follows:

Commencing at Vermont Avenue and going easterly the northerly group of buildings were numbered as 8012, 8012 $\frac{1}{4}$, 8012 $\frac{1}{2}$, 8012 $\frac{3}{4}$ and 8012 $\frac{7}{8}$ South Vermont Avenue. Commencing at Vermont Avenue the southerly group of buildings were numbered as 8014, 8014 $\frac{1}{4}$, 8014 $\frac{1}{2}$ and 8014 $\frac{3}{4}$ South Vermont Avenue.

At all times since March 1, 1947, the premises known as 8012 South Vermont Avenue were and they now are occupied by Pasquale Fontecchio, the father of affiant.

At all times since March 1, 1947, the premises known as [30] 8012 $\frac{1}{4}$ South Vermont Avenue were

and they now are occupied by Charles Fontecchio, the son of affiant. Since October 1, 1947, the premises known as 8014 South Vermont Avenue were and they now are occupied by an employee of affiant acting as manager for the motor court accommodations operated by affiant since approximately October 1, 1947.

At all times since March 1, 1947, the premises known as 8014 $\frac{1}{4}$ South Vermont Avenue were and they now are occupied by a tenant of affiant, one Mary Woody.

Prior to March 1, 1947, the premises known respectively as 8012 $\frac{1}{2}$, 8012 $\frac{3}{4}$, 8012 $\frac{7}{8}$, 8014 $\frac{1}{2}$ and 8014 $\frac{3}{4}$ South Vermont Avenue were vacated by the persons who theretofore had occupied the same as tenants of affiant. During March, 1947, affiant went to the office of the Office of Temporary Controls, an agency of the United States then administering the rent control regulations issued under and by virtue of the Emergency Price Control Act of 1942, as amended and extended, at 1206 South Santee Street, Los Angeles, California, and at that time had the following conversation with a woman whose last name was and is Skinnell who was then and there an employee of the rent division of the Office of Temporary Controls. At that time and place a conversation took place between affiant and the said Skinnell in substantially the following words:

Affiant said "I've got a court here and I've got it all vacant and I want it turned into a motor court. Can I do it."

Skinnell said "Under the present law, you can do it provided that after you get them all rented you bring an exact sketch down showing what you did and register your rooms. You can put any price you want on them and register them in ten days."

Skinnell then gave affiant a blank form DHD which is a form used for the registering of rooms and units in auto courts among other classes of establishments and said "When you get them [31] all rented fill it out and on the reverse side put a sketch of the arrangement of your rooms. What you have to do is wait until the inspector comes out and looks at the premises and we will pass judgment on whether or not you can charge what you want. You are entitled to charge what you register until you hear from us."

Affiant said "Can I register it right now?"

Skinnell said "Wait until the units are rented."

After receiving this advice, affiant made certain alterations in the premises known as 8012 $\frac{1}{2}$, 8012 $\frac{3}{4}$, 8014 $\frac{1}{2}$ and 8014 $\frac{3}{4}$ South Vermont Avenue.

Before the alterations were made, each of the above numbered units consisted of a living-room, bedroom, kitchen and bath. The living-room and bedroom of each unit faced the interior of the Court. The kitchen and bath were on the sides of the building away from the interior of the court. Entrance to each of the housing units was through a door opening onto the interior of the court leading into the living-room. From the living room inte-

rior doorways led respectively into the kitchen and bedroom and from the bedroom an interior doorway led into the bathroom.

Affiant made the following alterations in each of these units: The interior door between the living-room and bedroom was removed and the opening was closed up making a solid wall between the former living-room and bedroom. A door was opened into the bedroom from the interior of the court so as to provide a private outside entrance for this room. A door was cut in the wall of the kitchen so as to provide access to a small hallway which in turn led to an additional door which was cut through the wall of the bathroom.

In each unit of the above numbered units, after the alterations there was a room and a kitchen with access to the bathroom and a room with access to the bathroom. Each of the doors into the bathroom were provided with locks so that guests in one [32] of the two newly created units could use the bathroom and ensure privacy as against the occupants of the other unit. A portion of the hallway into the bathroom from the kitchen was equipped so as to constitute a closet for use in conjunction with the unit consisting of room and kitchen. Each of the rooms in each of the altered units was provided with beds so as to be usable as a sleeping room.

No change was made in the construction of the building known as 80127 $\frac{7}{8}$ which was located at the easterly end of the northerly row of buildings. The

following table shows the former numbering of the housing units and opposite each number is the number assigned to the newly constructed unit for purposes of reference in the operation of the premises as a motor court:

Old Number—8012 $\frac{1}{2}$ South Vermont Avenue.
New Number—Unit 1, Room and kitchen; Unit 2, Room.

Old Number—8012 $\frac{3}{4}$ South Vermont Avenue.
New Number—Unit 3, Room; Unit 4, Room and kitchen.

Old Number—8012 $\frac{7}{8}$ South Vermont Avenue.
New Number—Unit 5, Room, kitchen and bath.

Old Number—8014 $\frac{1}{2}$ South Vermont Avenue.
New Number—Unit 6, Room and kitchen; Unit 7, room.

Old Number—8014 $\frac{7}{8}$ South Vermont Avenue.
New Number—Unit 8, Room; Unit 9, room and kitchen.

After completing these alterations, affiant purchased a neon sign consisting of the word "motel" and installed it on the lot immediately in front of the manager's office, known as 8014 South Vermont, in such a position that it could be seen by persons traveling in a northerly or southerly direction on Vermont Avenue. Ever since October 1, 1947, said sign has been and it still is displayed in said location.

Prior to March 15, 1946, the City Council of the

City of Los Angeles passed an ordinance, No. 90,500, amending certain [33] sections of the Los Angeles Municipal Code (Ordinance No. 77,000) of the City of Los Angeles, among which amendments were the following:

“Section 12.14: The following regulation shall apply in the C-2 Commercial Zone:

“A. Use—No building, structure, or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses:

* * *

“42: Tourist court . . .”

Section 12.03, defining a “tourist court” as follows:

“A group of attached or detached buildings containing individual sleeping or living units, designed for or used temporarily by automobile tourists or transients, with garage attached or parking space conveniently located to each unit including auto courts, motels, or motor lodges.”

That said Ordinance No. 90,500 of the City of Los Angeles was approved on March 15, 1946, and ever since has been and now is in full force and effect as an ordinance of the City of Los Angeles. The real property herein described was at all times mentioned herein and still is within an area zoned by the City Council of the City of Los Angeles as a C-2 Zone in which it was and still is lawful to

conduct the business of operating a motor court or tourist court.

On or about October 1, 1947, affiant commenced operating the premises hereinabove described as a motor court. At all times since said date in connection with the occupancy of Units 1 to 9, inclusive, in said motor court, affiant has furnished to said guests furniture, linen, soap and services such as removal of garbage and trash and daily cleaning service. [34]

Since October 1, 1947, affiant has maintained in the regular course of the business of operating the said motor court a card register system consisting of cards upon which are spaces for recording the name and address of guests of the motor court, the car license number, the state of registration, the make of car, the number of persons, the unit number to which the guest is assigned, the rate charged for occupancy of the unit, the date of arrival and departure, the days occupied, the number of days charged for and the amount paid. At the time of registering the information on the card as to name and address, car and license number, state of registration, make of car, number of persons in the guest's party are supplied by the guest registering and recorded on the card. At this time affiant or his employees insert the unit number to which the guest is assigned, the rate to be charged for the unit and the date of arrival. The amount paid is also inserted at this time. Upon the guest's departure, the date of departure is recorded, the days

occupied is recorded, and the number of days of occupancy is recorded by affiant or his employees. These records are prepared and kept at the direction of affiant either by himself or by his employees and are kept and maintained as records of the business of conducting affiant's motor court. Since the commencement of operation of said motor court on or about October 1, 1947, to and including April 30, 1948, approximately 350 such cards have been prepared, kept and maintained. Attached hereto as Exhibit "A" hereof is a summary of data recorded on said cards showing the name of the guest, the town from which guest registered, whether or not the guest had an automobile, the date of registration and the date of departure, and the number of days of occupancy paid for by the guest. This summary was prepared by copying the items shown from the records referred to above. In some cases the signature of the guest was illegible. In such case a question mark in parentheses has been [35] placed after the guest's name. Where the record card affirmatively shows that the guest had no card or where the card does not show either way whether or not there was a car, the word "No" is placed in the column headed "Car." Where no notation appears, the card affirmatively shows that the guest did have a car. In some cases the number of days of occupancy paid for is less than the actual number of days during which the guest occupied his unit. This results from affiant's general rental practice of permitting one day free occupancy to guests

who stay seven days or more for each seven days of occupancy.

The original records cannot be examined at court without great loss of time. The evidence sought from them is only the general result of the whole so far as it indicates that said premises have been since October 1, 1947, and are being, used temporarily by automobile tourists or transients and that said premises have been since October 1, 1947, commonly known as a motor, auto or tourist court in the community.

The rates charged by affiant for said units have been uniformly \$3.50 or \$4.00 per day for the units consisting of sleeping room only, depending upon whether there were one or two occupants, and \$4.50 per day for the units which consist of sleeping room and kitchen. Four of the units consist of sleeping room only with a total occupancy rate of \$16.00 per day when occupied to capacity. There are five units with kitchen with a total occupancy rate of \$22.50 per day when occupied to capacity. The total occupancy rate for the motor court premises when filled to capacity is \$38.50 per day.

Defendant's notice of proceedings dated January 20, 1948, proposed to establish a total maximum occupancy rate for said premises when filled to capacity of \$13.75 per day.

After receiving defendant's notice of proceedings dated January 20, 1948, affiant filed objections in said proceedings, [36] described as Docket No. 262,-021 in the office of the defendant. Said objections

were in the words and figures contained in a copy thereof which is attached hereto and is by this reference made a part hereof as though herein fully set forth.

The Housing Expediter, Tighe E. Woods, was informed of this action prior to March 25, 1948, and on that date in the City of Washington, District of Columbia, executed an affidavit herein relating to his residence in the City of Washington and to the fact that he had not been served with summons and complaint herein. Said affidavit is incorporated herein by this reference and made a part hereof as though herein fully set forth.

Notwithstanding his knowledge of this action, the said Tighe E. Woods has not altered his erroneous interpretation of the provisions of the Housing and Rent Act of 1947 requiring a motor court to have been such on June 30, 1947, in order to be decontrolled under and by virtue of the provisions of said Act and on the contrary, with full knowledge of this action, said Housing Expediter issued on April 1, 1947, Amendment 27 to the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments expressly incorporating therein a provisions restricting decontrol of motor courts to those which were such on June 30, 1947.

By reason of the foregoing, affiant alleges that it would be futile to make any request of the said Tighe E. Woods to withdraw his interpretation or to alter his regulation so as to permit decontrol of affiant's accommodations under the express terms of the regulation.

EXHIBIT "A"

Summary of Rentals of Motor Court Units at Premises
8012-8014 7/8 South Vermont Avenue, Los Angeles, California.

STATISTICAL ANALYSIS

Number of Separate Rentals			No.	%
October 1, 1947 to April 30, 1948.....			272	100.00
Length of Guest Occupancy		No.	%	
One day only		226	83.09	
2 - 7 days		34	12.50	
8 - 14 days		5	1.84	
15 - 30 days		2	.73	
Over 30 days		5	1.84	
Totals.....			272	100.00
			272	100.00

EXHIBIT "A"

Unit No.	Guest	No. in Party	Registered From	Car	In	Out	Days Paid
<u>Oct. 1947</u>							
1	Nelson	2	Tulare		10/3	10/4	1
2	Harris	1	Los Angeles	No	10/3	10/4	1
	Rhodes	2	Wichita, Kansas	No	10/9	10/10	1
	Lopez	2	Los Angeles		10/11	10/12	1
	Earee	1	Pasadena		10/15	10/16	1
	Kelly	2	Los Angeles		10/16	10/17	1
	Alton	1	Riverbank		10/16	10/17	1
	Eldred	2	?		10/19	10/20	1
	Gordon	2	Santa Maria	No	10/21	10/22	1
	Baggett	2	Mesa, Arizona	No	10/23	10/24	1
	Harris, L. E.	2	Los Angeles	No	10/25	10/26	1
	Bonedonna	2	San Diego		10/26	10/27	1
	Preiss	1	El Segundo		10/28	10/29	1
	Potter	2	San Francisco	No	10/31	11/2	2
3	Hamilton	2	San Francisco		10/5	10/6	1
	Prochaska	4	Cleveland, Ohio		10/6	10/9	3
	Harris, H. H.	2	Long Beach		10/11	10/12	1
	Griffin & Alton	2	Painwell, Michigan	No	10/18	10/19	1
	Sinett	2	Studio City		10/25	10/26	1
	Duckworth & Pruitt	2	Los Angeles		10/30	10/31	1
4	Howard & Helman	2	Los Angeles	No	10/17	10/19	2
	Pruitt	2	S.S. Fairfield		10/31	11/1	1
5	Bone & Ford	2	Denver, Colorado		10/3	10/9	7
	Oden	2	Gothenberg, Nebraska		10/18	10/19	1
	Edwards	2	Mesa, Arizona		10/23	10/24	1
	Simmons	4/2ch.	Los Angeles		10/25	11/1	7
6	Helms	2	Los Angeles		10/3	10/4	1
7	Szkora	2	Los Angeles	No	10/7	10/8	1
	Saunders (7)	2	San Diego		10/8	10/9	1
					10/11	10/12	1
	Griffin	2	Painwell, Michigan	No	10/14	10/15	1
	Saunders (?)	2	San Diego		10/17	10/19	2
	Jones	2	Monterey Park		10/22	10/23	1
	Hillan	2	Banning		10/24	10/25	1
	McFarland	1	South Gate		10/25	10/26	1
					10/28	10/31	2
& 9	Peterson & family	4	Kansas City, Missouri		10/3	10/12	9
	Bennett	1	U. S.S. Helena	No	10/17	10/18	1
	Gollucci	2	San Diego		10/18	10/19	1
	Hogan	2	Compton		10/25	10/26	1
	Brown	2	U.S.S. Helena	No	10/17	10/18	1
	E. Collins	3/1ch.	Los Angeles		10/26	10/31	6
<u>Nov. 1947</u>							
	Diller	4	Los Angeles	No	11/8	11/9	1
	Neville	4	Los Angeles		11/19	11/30	11
	Bauer	1	Denver, Colorado	No	11/2	11/5	3
	Harris, E. H.	2	San Diego		11/5	11/6	1
	Maenaker	2	Nempe, Idaho		11/6	11/7	1
	Powers	1	Los Angeles	No	11/3	11/19	6
	Gardner	2	Los Angeles	No	11/22	11/23	1
	Cote	2	Los Angeles	No	11/26	11/27	1
	Carroll	2	Los Angeles	No	11/1	11/2	1
	(Bauer	1	Denver, Colorado		11/5	11/16	6
	(Sullivan	2	Baker		11/8	11/9	1
	Yuengst & Roth	2	Phoenix, Arizona		11/21	11/22	1
	Pennington	2	Shreveport, La.		11/26	11/27	1
	Schuey	1	Denver, Colorado		11/27	12/1	4



Unit No.	Guest	No. in Party	Registered From	Car	In	Out	Day
Nov. 1947 (cont'd.)							
	Brandon	4/2ch	Los Angeles		11/3	11/4	1
	Roberts	2	National City		11/8	11/9	1
	Ferguson & Tucker	2	Los Angeles		11/18	11/26	9
	Simmons, L. E.	4/2ch	Los Angeles	No	11/4	11/9	5
	Madden	3	Los Angeles		11/17	11/22	5
	Cole	3	Los Angeles		11/27	12/2	5
	Jolly	1	Point Mugu		11/8	11/9	1
	Hammett	2/1ch	Los Angeles		11/14	12/3	17
	Campbell	2	San Diego	No	11/1	11/2	1
	Anthony	2	San Diego		11/7	11/8	1
	Lewis	2	Los Angeles	No	11/8	11/9	1
	Carnero	2	Los Angeles		11/10	11/11	1
	Farr	1	Denver, Colorado		11/19	11/28	7
	Maenaha	1	Los Angeles		11/7	11/8	1
	Flynn (?)	2	Los Angeles		11/8	11/9	1
	Buscarone	2	Los Angeles		11/15	11/16	1
	Stone	2	San Pedro		11/20	11/21	1
	Carroll	2	Los Angeles		11/21	11/22	1
	Paulsen	2	San Leandro		11/22	11/23	1
	Cote	2	Los Angeles	No	11/27	11/29	2
	Collins	4/1ch	Los Angeles		11/2	11/30	20
Dec. 1947							
	Brack	2	Los Angeles	No	12/6	12/7	1
	Kinney	2	San Diego	No	12/13	12/14	1
	Hazeldon	2	Los Angeles	No	12/27	1/1	5
	Parsons	2	Los Angeles	No	12/6	12/7	1
	Karverd (?)	2	Oklahoma City, Oklahoma	No	12/7	12/8	1
	Arant (?)	2	Gardena		12/9	12/10	1
	Cromwell	2	Los Angeles		12/12	12/13	1
	Carter	1	San Diego		12/13	12/14	1
	Senker	2	San Diego		12/17	12/18	1
	Frenner (?)	2	Los Angeles		12/17	12/18	1
	Carpenter	2	Waukegan, Michigan		12/18	12/19	1
	Basarab	2	El Low		12/21	12/22	1
	Comez	2	San Bernardino	No	12/23	12/24	1
	Basarab	2	El Low		12/24	12/25	1
	Wonegan	2	Woods Cross, Utah		12/31	1/1	1
	Galap	2	Los Angeles	No	12/17	12/18	1
	McKittrick	1	Fairfield		12/19	12/20	1
	Dixon	2	San Diego		12/30	12/31	1
	Anderson & Bummitt	2	Oceanside		12/31	1/1	1
	Ferguson & Tucker		Los Angeles	No	12/27	12/30	32
	Goring	2	San Francisco		12/3	12/4	1
	Harris, L. E.	4/2ch	Los Angeles	No	12/15	12/31	16
	Hammett	3/1ch	Los Angeles		12/3	12/12	7
	Anderson	3/1ch	Courtenay, North Dakota		12/30	1/1	2
	Turnbull	2	Los Angeles		12/3	12/4	1
	Haibu (?)	2	North Hollywood		12/9	12/10	1
	Allen	2/1ch	San Pedro		12/10	12/11	1
	Dobson	2	Los Angeles		12/13	12/14	1
	Nelson	1	Clearwater		12/17	12/18	1
	Molloy	2	Owasso, Michigan		12/18	12/19	1
	Wilson	1	Commerce, Texas	No	12/21	12/22	1
	Badovinac	2	Detroit, Michigan		12/27	12/28	1
	Wonegan	1	Woods Cross, Utah		12/31	1/1	1



Unit No.	Guest	No. in Party	Registered From	Car	In	Out	Day Paid
Dec. 1947							
(cont'd.)							
	Figuerido	2	Riverside	No	12/6	12/7	1
	Brown	1	Richmond		12/13	12/14	1
	Costello	2	New York City		12/17	12/18	1
	Collins	3/1ch	Los Angeles		11/30	12/30	29
	Juan	3	Windom, Minnesota		12/17	12/18	1
Jan. 1948							
	Hazeldon	2	Los Angeles	No	1/1	1/4	3
	Wilson	3	Los Angeles		1/9	2/2	24
	Allen	2	Long Beach		1/1	1/2	1
	Cabner	2	Burbank		1/3	1/4	1
	Brake	2	Woodlake	No	1/8	1/9	1
	Parsons	2	Los Angeles		1/10	1/11	1
	Strong	2	Riverside		1/11	1/12	1
	Rockhold	2	San Francisco		1/13	1/14	1
	Lee	1	Los Angeles	No	1/16	1/17	1
	Fstes	1	San Diego		1/21	1/22	1
	McQuellen	2	Pt. Mugu		1/24	1/25	1
	Welter	2	San Diego		1/27	1/29	2
	Pennington	2	Shreveport, La.	No	1/30	1/31	1
	Legan	1	Los Angeles		1/31	2/1	1
	Snedeker (?)	2	San Diego		1/1	1/2	1
	Ashley	1	Los Angeles		1/9	1/10	1
	Alton & Woodley	2	Riverbank	No	1/10	1/11	1
	Wilkins	2	Pittsburgh, Pa.		1/16	1/17	1
	Livermore	1	Alameda		1/24	1/26	2
	Paysen	1	Anaheim		1/28	1/30	2
	Long	2	Long Beach	No	1/30	1/31	1
	Schwartz	2	Compton		1/31	2/1	1
	Ferguson	2	Los Angeles		1/1	1/6	5
	Morse	2	Londen, Texas		1/10	1/11	1
	Kohlmeier	2	Los Angeles	No	1/11	1/31	19
	Harris	2/2ch	Los Angeles		12/31	1/13	13
	Manton	2	Los Angeles		1/24	1/25	1
	Reeve	2	Los Angeles		1/31	2/1	1
	Anderson	2/1ch	Courtenay, North Dakota	No	1/1	2/2	33
	Bellon	2	South Bend, Indiana		1/2	1/3	1
	Pennington	2	Shreveport, La.		1/10	1/11	1
	Upstam	1	San Bernardino		1/14	1/15	1
	Samudi	2	Bakersfield	No	1/16	1/17	1
	Hamilton	2	Bakersfield		1/24	1/25	1
	Clark	2	San Bernardino		1/28	1/29	1
	Moody	2	San Pedro		1/31	2/1	1
	Paris	2	San Fernando	No	12/31	1/3	3
	Allsep	1	Riverbank		1/10	1/11	1
	Maloof	2	Los Angeles		1/15	1/16	1
	Carlyle	2	San Diego		1/16	1/17	1
	Cuccimani	2	Los Angeles	No	1/24	1/25	1
	Ed Collins	2/1ch	Los Angeles		12/30	1/11	12
	Austin	2	Los Angeles		1/22	1/23	1
	Cafood	2	San Francisco		1/24	1/25	1
	Anderson	2	San Diego		1/28	1/31	3
1948							
	Wilson	2/1ch	Los Angeles	No	2/2	2/16	12
	Hanard	2			2/21	2/22	1
	Deville	2	San Francisco		2/28	2/29	1
	McWilliams	1	Los Angeles		2/3	2/6	3
	Sephar & Wilson	2	Akron, Ohio	No	2/7	2/8	1
	Kennedy	1	Los Angeles		2/9	2/10	1
	Oliver	1	San Francisco		2/12	2/13	1
	Newton	2	Fresno		2/14	2/15	1
	Morris	1	Glendale	No	2/17	2/18	1

Unit No.	Guest	No. in Party	Registered From	Car	In	Out	Days Paid
Feb. 1948							
Cont'd.)	Payne	1	Thermal		2/20	2/21	1
	Papst	1	Culver City	No	2/21	2/22	1
	Somerville	1	Los Angeles	No	2/22	2/23	1
	Zumger	1	San Francisco	No	2/28	2/29	1
	Strulz	2	Los Angeles		2/28	3/1	1
	Stafford	2	Elk City, Okla.		2/2	2/3	1
	Stevens	2	San Francisco		2/4	2/5	1
	Heneker	2	San Francisco (?)		2/5	2/6	1
	Lombard	1	Los Angeles		2/6	2/7	1
	Stevens	2	Pasadena	No	2/7	2/8	1
	Class	2	Long Beach	No	2/14	2/16	2
	Bailey	1	Oceanside	No	2/20	2/21	1
	Johnson	2	Los Angeles	No	2/21	2/22	1
	Chilson	2	Chicago, Illinois		2/28	2/29	1
	Kohlmeier	2	Los Angeles	No	2/1	2/25	21
	Lovell	2	Las Vegas	No	2/4	2/5	1
	Morton	2	Los Angeles	No	2/7	2/12	5
	Johnson	1	Palmyra, Pa.		2/14	2/16	2
	Stevens	2	Pasadena	No	2/21	2/23	2
					2/28	2/29	1
	Anderson	2/1ch	Courtenay, N. D.		2/3	2/15	9
	Jones	2	Roseburg, Oregon	No	2/21	2/22	1
	McAren	2	Tan Oak Park	No	2/4	2/5	1
	Bummett & Bailey	2	Oceanside	No	2/7	2/8	1
	King	1	Spring Valley		2/9	2/10	1
	Stevenson	2	Las Vegas		2/11	2/12	1
	Dupree	2	San Fernando		2/12	2/13	1
	Pennington	2	Shreveport, La.	No	2/13	2/14	1
	Sprool	2	Long Beach		2/14	2/15	1
	Trabert	2	Garden City, Kansas	No	2/19	2/20	1
	Potter	2	Los Angeles		2/20	2/21	1
	Ewing	2	Los Angeles		2/21	2/22	1
	Phillips	2	Wasco		2/22	2/23	1
	Carpenter	2	Phoenix, Arizona		2/26	2/27	1
	Fule	1	Los Angeles		2/27	2/28	1
	Erskine	2	Los Angeles		2/28	2/29	1
	Squillace	1	Utica, N.Y.	No	2/1	2/8	6
	Husos	3	Minneapolis, Minn.	No	2/14	2/15	1
	Kirkpatrick & Bowers	2	Oceanside	No	2/20	2/21	1
	Pennington	2	Shreveport, La.	No	2/21	2/22	1
	Hallen	1	San Diego	No	2/22	2/23	1
	Pennington	2	Shreveport, La.	No	2/28	2/29	1
	Bartaletti	2	Utica, N.Y.	No	2/1	2/8	7
	Searcy	2	Santa Monica		2/14	2/15	1
	Marzullo	2	San Francisco		2/21	2/22	1
March 1948							
	Green	4	Los Angeles		3/28	4/2	5
	Hise	1	Berkeley	No	3/3	3/4	1
	Stevens	2	San Diego		3/6	3/7	1
	Albanese	1	Medina, N. Y.		3/14	3/15	1
	Smith	2	San Francisco	No	3/16	3/17	1
	Hickman	2	Roseville		3/17	3/18	1
	Allen	2	Oceanside	No	3/19	3/20	1
	Hoover	2	Washington		3/23	3/24	1
	Warner	2	San Diego		3/20	3/21	1
	Banks	2	Los Angeles	No	3/27	3/28	1

Unit No.	Guest	No. in Party	Registered From	Car	In	Out	Days Paid
March, 1948 cont'd)							
	Hanson	1	San Diego		3/6	3/7	1
	Stone	1	San Pedro	No	3/11	3/12	1
	Jackson	2			3/16	3/17	1
	James	2	Provo, Utah		3/17	3/18	1
	Heine	2			3/19	3/20	1
	Braun	1	Los Angeles	No	3/20	3/21	1
	Adrelman	1	Oakland	No	3/27	3/28	1
	Sharp	2	Hammond, Indiana		3/29	3/30	1
also 4)	Pennington	2	Shreveport, La.	No	3/30	3/31	1
also 4)	Secley	2	Berkeley		3/25	3/26	1
	Stevens	2	Pasadena	No	3/1	3/2	1
					3/8	3/9	1
	Ryan & Stoner	2	Riverside		3/14	3/15	1
	Smith	2	Los Angeles	No	3/15	3/20	5
	Smith	2	Indio		3/22	3/29	7
	Cunningham	2	Glendale		3/5	3/6	1
	Stevens	2	San Bernardino		3/6	3/7	1
	Phelps	2	San Diego		3/12	3/13	1
	Stevens	2	Pasadena		3/13	3/14	1
	Wiscombe	2	Pasadena		3/15	3/16	1
	Kwani	2	Provo, Utah		3/17	3/18	1
	Mullahy	1	San Francisco	No	3/20	3/21	1
	Dulingham	1	Los Angeles	No	3/22	3/29	7
	Williams & Anderson	2	Los Angeles	No	3/31	4/1	1
	Stoner	2	Oceanside	No	3/5	3/7	2
	Cook	1	Los Angeles		3/13	3/14	1
			San Diego		3/16	3/17	1
April, 1948							
	Green	4	Los Angeles		4/2	4/11	8
	Kelley	2	St. Louis, Missouri		4/10	4/11	1
	Sloan	2	San Diego		4/23	4/24	1
	Banks	2	Los Angeles	No	4/24	4/25	1
	Rodriguy	2	Colton		4/2	4/3	1
	Banks	2	Los Angeles	No	4/3	4/4	1
	Odom	2	Huntington Park	No	4/10	4/11	1
	Smith	2	Camp Kendall	No	4/17	4/18	1
	Alton & Woodly	2	Camp Pendleton	No	4/23	4/25	1
	Stevens	2	Pasadena	No	4/25	4/26	1
	Stevens	2	Pasadena	No	4/10	4/11	1
					4/13	4/14	1
					4/17	4/18	1
	Nelson	2	San Diego		4/24	4/26	2
	Stevens	2	Pasadena		4/26	4/27	1
	Demosthenes	2	San Francisco		4/3	4/4	1
	Oliviri	2	San Francisco		4/3	4/4	1
	Banks	2	Los Angeles		4/10	4/11	1
	Lewis	2	Oakland		4/14	4/15	1
	Wosstell	2	Toledo, Ohio		4/16	4/17	1
	Pica	2	Los Angeles	No	4/12	4/13	1
	Kevari	2	San Francisco	No	4/17	4/19	2
	Field	2	Chicago, Illinois		4/21	4/22	1
	Brown	2	Huntington Park	No	4/22	4/23	1
	Kevari	2	San Francisco	No	4/24	4/25	1
	Gee	1	Nodami, Iowa	No	4/25	4/26	1
	Moxer	1	Los Angeles		4/26	4/27	1
	Hymans	1	San Diego	No	4/2	4/3	1
	Moody	2	Petersburg, W. Va.		4/3	4/4	1
	Lowry	1	Pomona	No	4/10	4/11	1
	Metz	1	Los Angeles		4/11	4/12	1
	Garden	2	Las Vegas		4/17	4/18	1
	Heins	1	Camp Pendleton		4/23	4/24	1
	Warren	2	Los Angeles		4/3	4/8	1

Before the Area Rental Director, Los Angeles Defense Rental-Area, Office of the Housing Expediter.

Docket No. 262021

In the Matter of Proceedings to Fix a Maximum Rent for 8012-8014 South Vermont Avenue, Los Angeles, California.

J. FONTECCHIO, LANDLORD

State of California,
County of Los Angeles—ss.

J. Fontecchio, being first duly sworn, deposes and says:

That he has heretofore received the notice of proceedings by the Rent Director proposing to reduce the rents of the above-mentioned housing accommodations under Section 5(c)(1) of the Rent Regulation.

Affiant objects to the issuance of any such order on the ground that the premises above mentioned are a motor court within the meaning of that term as used in the Housing Rent Act of 1947, and the Rent Director has no power, authority or jurisdiction to issue any order fixing maximum rents for said accommodations.

In approximately March of 1947, the premises, which had theretofore been a bungalow court, were vacated by the tenants as affiant proposed to convert the said accommodations into a [44] motor

court. At that time he inquired of the staff of the Area Rent Director and was advised that that could be done.

In accordance with this advice, affiant made eight (8) units out of what had previously been four (4) units, so arranging them that half of the units consisted of a bedroom and kitchen, while the other half consisted of a sleeping room only, the occupants of each of said units sharing the bathroom.

Each of said units has a separate entrance.

Immediately adjacent to the accommodations is 4,000 square feet of parking space, black topped, and in addition there are five (5) garages on the rear of the lot which can be and are used, as well as the parking space, by guests of the motor court.

The alterations necessary to convert these accommodations and to create additional accommodations by such conversion was commenced after February 1, 1947, and was not completed until approximately October 1, 1947.

Prior to commencing operations as a motor court, affiant purchased a neon sign, reading "Motel," which is placed in front of the property next to that part of the property in which affiant lives and which affiant also uses as the manager's office.

Since October 1, 1947, occupancy of the said units has been almost exclusively transient, thus in October, 1947, 40 different guests stayed one day, 4 stayed five days, and 2 stayed six days. In November, 1947, 33 stayed one day, 11 stayed two days, 2

stayed three days, 2 stayed four days, 9 stayed five days, and 2 stayed six days.

In December, 1947, 25 stayed one day, 15 stayed two days and 14 stayed five days.

In January, 1948, up to January 24, 1948, 42 stayed one day, 8 stayed two days, 1 stayed three days and 12 stayed five days. [45]

Affiant furnishes furniture, linen, soap, and cleans each unit each day.

Affiant operates said accommodations in all respects as any other motor court is operated in Southern California.

The actual cost of operation of each unit, including licenses, insurance, real property taxes, utilities, the operation of the sign, laundry and supplies, cleaning and depreciation, without any allowance for management, is \$1.72 per day, which is less than the amount proposed by the Area Rent Director to be allowed per day for the rental of these units. This figure is arrived at as follows:

DAILY COST

2 bath towels.....	.10
2 sheets .....	.24
2 pillow slips.....	.16
2 hand towels.....	.08
1 bath mat.....	.08
2 face cloths.....	.06
soap .....	.05
room cleaning.....	30

\$1.27

Pro rata share of utilities, insurance, taxes, licenses.....	.235
Depreciation on real property.....	.21 $\frac{2}{3}$
<hr/>	
Total	\$1.72

Affiant registered these accommodations on or about October 9, 1947, and at the time he registered the same he wrote upon the form containing his registration that said premises were on auto court. At that time, a Miss Regan, an employee of the Area Rent Director, told him that he could not register that way and she erased the words "auto court" from the registration and inserted instead some other classification. That this act on the part of the said Regan was and is erroneous and said registration should be corrected to reflect its original condition.

Affiant has filed herewith his application for decontrol [46] of said accommodations.

Wherefore, affiant requests that proceedings in the foregoing docket number be terminated and no order issue and that his application for decontrol be approved and that he be recognized as a motor court.

[Endorsed]: Filed May 28, 1948. [47]

[Title of District Court and Cause.]

AFFIDAVIT OF AUSTIN CLAPP IN SUP-
PORT OF MOTION FOR SUMMARY JUDG-
MENT

State of California,
County of Los Angeles—ss.

Austin Clapp, being first duly sworn, deposes and
says:

That I am an attorney at law duly licensed to
practice in all of the courts of the State of Califor-
nia and in this court. Prior to February 19, 1948,
I was employed by the plaintiff in this action to
represent him in connection with the proposed ac-
tion of the defendant to issue an order establishing
maximum rents for the accommodations in plain-
tiff's motor court.

Edwin D. Hamlin is Chief Area Rent attorney
for the Los Angeles Defense-Rental Area of the
Office of Rent Control of the Office of the Housing
Expediter. [48]

I have known Mr. Hamlin for some time and I
am familiar with his voice. On or about February
16, 1948, I called Mr. Hamlin at his office on the
telephone and requested him to review the file be-
ing Docket No. 262021 and advise me whether or not
he would recommend that the proposed order be
withheld. On or about February 18, 1948, Mr. Ham-
lin telephoned me at my office. I recognized the
voice I heard over the telephone to be that of Ed-

win D. Hamlin. At that time he and I had a conversation in substantially the following words:

Hamlin said "I have reviewed the file and I do not believe that Mr. Fontecchio's premises are eligible for decontrol."

I said "You are still relying on the Washington interpretation that a motor court must have been such on June 30, 1947, in order to qualify for decontrol."

Hamlin said "Yes."

I said "I intend to file an action for declaratory relief and injunction to decide this matter and I wonder if it would be possible to withhold any order until such time as the legal question can be decided by the Court."

Hamlin replied "It would not be possible for us to enter into any such stipulation."

I said "Then it would be necessary for me to secure a temporary restraining order against the issuance of your order."

/s/ AUSTIN CLAPP.

Subscribed and sworn to before me this 27th day of May, 1948.

[Seal] /s/ EARL A. LYON,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 7, 1949.

(Duly Verified.)

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 28, 1948. [49]

[Endorsed]: No. 12104. United States Court of Appeals for the Ninth Circuit. Ben C. Koepke, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, Appellant, vs. J. Fontecchio, Appellee. Transcript of Record. Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed November 30, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12104

BEN C. KOEPKE, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON
APPEAL

The District Court erred in:

1. Granting plaintiff's motion for summary judg-

ment because there were definite issues of fact presented by the pleadings.

2. Entering judgment against the defendant on the ground that the premises herein were not controlled housing accommodations but were exempt within the meaning of Section 202(c)(2) of the Act.

3. Granting judgment for the plaintiff and restraining defendant in the performance of his official duties since the plaintiff has had an adequate remedy at law.

4. Granting judgment against the United States, the real party in interest, in an action in which it had not consented to be sued.

5. Granting judgment for the plaintiff herein because Tighe E. Woods, the Housing Expediter, was an indispensable party to this action but was not joined as a party.

6. Failing to dismiss the complaint against the defendant on the ground that it failed to state a claim upon which relief could be granted.

7. Granting judgment for the plaintiff.

Dated this 8th day of December, 1948.

/s/ FRANCIS X. RILEY,
Special Litigation Attorney.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed December 10, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
ON APPEAL

Appellant, Ben C. Koepke, individually, and as Area Rent Director, Office of the Housing Expediter, hereby designates the following portions of the Record to be included in the Record on Appeal.

1. The complaint filed in the Superior Court of the State of California, in and for the County of Los Angeles, No. 540994.

2. Answer in United States District Court, No. 8078-PH.

3. Motion for summary judgment filed by plaintiff.

4. Affidavit of Ben C. Koepke filed June 4, 1948.

5. Supplemental affidavit of J. Fontecchio, filed June 7, 1948.

6. Supplemental affidavit of Austin Clapp, filed June 7, 1948.

7. Minute order by Peirson Hall, District Judge, filed July 19, 1948.

8. Judgment in United States District Court.

9. Order granting motion for summary judgment.

10. Notice of Appeal.

11. This designation of Record.

Dated this 8th day of December, 1948.

/s/ FRANCIS X. RILEY,

Special Litigation Attorney,
Attorney for Appellant.

[Endorsed]: Filed December 10, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDI-
TIONAL PORTIONS OF THE RECORD ON
APPEAL

Appellee, J. Fontecchio, having been served with appellant's Designation of Record on Appeal, hereby designates the following additional portions of the record to be included in the record on appeal:

(1) Affidavit of Tighe E. Woods, dated March 25, 1948, in support of motion of Ben C. Koepke to dismiss;

(2) Affidavit of J. Fontecchio together with exhibits to said affidavit in support of motion for summary judgment;

(3) Affidavit of Austin Clapp in support of motion of summary judgment.

Dated: December 17, 1948.

BENT AND CLAPP,
By AUSTIN CLAPP,
Attorney for Appellee.

[Endorsed]: Filed December 18, 1948. Paul P. O'Brien, Clerk.

No. 12104

United States
Court of Appeals
for the Ninth Circuit

BEN C. KOEPKE, Individually, and as Area
Rent Director, Los Angeles Defense-Rental
Area, Office of Rent Control, Office of the Housing
Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

FILED

MAR 4 - 1949

PAUL R. O'BRIEN, /
CLERK

No. 12104

United States
Court of Appeals
for the Ninth Circuit

BEN C. KOEPKE, Individually, and as Area
Rent Director, Los Angeles Defense-Rental
Area, Office of Rent Control, Office of the Housing
Expediter,

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J. FONTECCHIO,

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SUPPLEMENTAL
Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 8078-PH

J. FONTECCHIO,

Plaintiff,

vs.

BEN C. KOEPKE, Individually, and as Area Rent
Director, Los Angeles Defense-Rental Area, Of-
fice of Rent Control, Office of the Housing Ex-
pediter,

Defendant.

MOTION OF BEN C. KOEPKE, INDIVIDU-
ALLY, AND AS AREA RENT DIRECTOR,
LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF THE HOUSING EXPEDITER,
TO DISMISS THE COMPLAINT

Defendant, Ben C. Koepke, individually, and as
Area Rent Director, Los Angeles Defense-Rental
Area, Office of Rent Control, Office of the Housing
Expediter, moves the Court to dismiss the above-
entitled cause for the following reasons:

1. This defendant, as Area Rent Director as
aforesaid, is a subordinate official subject to the
orders of his superior who is Tighe E. Woods, Hous-
ing Expediter, Office of the Housing Expediter, an
independent agency of the United States, as ap-
pears from the Complaint, and cannot be sued or

enjoined unless said Housing Expediter is properly made a party to the action.

2. That Tighe E. Woods, Housing Expediter, Office of the Housing Expediter, is a necessary and indispensable party-defendant to this action, and no service has been obtained or can be obtained upon said Tighe E. Woods, since his official residence is in Washington, D. C. Therefore, this suit must be dismissed because there is no jurisdiction over said Tighe E. Woods as a necessary and indispensable party-defendant.

3. The within action is attempted to be maintained as a suit against the United States of America, which has not consented to be sued herein.

4. The Complaint herein fails to state a claim upon which relief can be granted.

/s/ ED DUPREE,

General Counsel.

HUGO V. PRUCHA,

Assistant General Counsel.

/s/ FRANCIS X. RILEY,

Special Litigation Attorney.

/s/ ABE I. LEVY,

Chief, Litigation Unit.

Attorneys for Defendant, Ben C. Koepke, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter.

[Endorsed]: Filed March 30, 1948. Paul P. O'Brien, Clerk.

[Endorsed]: No. 12104. United States Court of Appeals for the Ninth Circuit. Ben C. Koepke, Individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, Appellant, vs. J. Fontecchio, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 8, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12104

BEN C. KOEPKE, Individually, and as Area
Rent Director, Los Angeles Defense-Rental
Area, Office of Rent Control, Office of the Hous-
ing Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

STIPULATION TO SUPPLEMENT RECORD
ON APPEAL AND ORDER THEREON

It Is Hereby Stipulated and Agreed by and between the appellant, Ben C. Koepke, individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of Rent Control, Office of the Housing Expediter, and the appellee J. Fontecchio, through their respective counsel, that the Record on Appeal in the above-entitled action shall be supplemented by the addition of the Motion of Ben C. Koepke, individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of the Housing Expediter, to dismiss the Complaint, certified copy of said Motion to be presented to the

above-entitled court with the original of this Stipulation.

FRANCIS X. RILEY,
FRANK L. HIRST,

By /s/ FRANK L. HIRST,
Attorneys for Appellant.

BENT AND CLAPP,
By /s/ AUSTIN CLAPP,
Attorneys for Appellee.

Dated this 4th day of February, 1949.

The Court having considered the foregoing Stipulation and Good Cause Appearing Therefor, It Is Hereby Ordered that the Record on Appeal be supplemented by the addition of the Motion of Ben C. Koepke, individually, and as Area Rent Director, Los Angeles Defense-Rental Area, Office of the Housing Expediter, to dismiss the Complaint.

Dated this 8th day of February, 1949.

/s/ WILLIAM DENMAN,
/s/ CLIFTON MATHEWS,
/s/ WILLIAM HEALY,

Judges, United States Court of Appeals for the
Ninth Circuit

[Endorsed]: Filed February 8, 1949. Paul P.
O'Brien, Clerk.

No. 12104

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN C. KOEPKE, Individually, and as Area Rent Director,
Los Angeles Defense-Rental Area, Office of Rent Control,
Office of the Housing Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

BRIEF OF APPELLEE.

BENT AND CLAPP,
3780 West Sixth Street, Los Angeles 5,
Attorneys for Appellee.

APR 20 1949

PAUL P. O'BRIEN, -
CLERK

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No. 12104

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEN C. KOEPKE, Individually, and as Area Rent Director,
Los Angeles Defense-Rental Area, Office of Rent Con-
trol, Office of the Housing Expediter,

Appellant,

vs.

J. FONTECCHIO,

Appellee.

BRIEF OF APPELLEE.

Statement of the Case.

On October 1, 1947, appellee commenced operating as a motor court certain of the buildings located on the lot described in his affidavit [R. 33, *et seq.*] the whole of which is commonly known as 8008-8014 $\frac{7}{8}$ South Vermont Avenue, Los Angeles, California.

The buildings so used were the unit used by the manager as an office and residence, the eight units in two buildings which had been converted from four units, the building on the rear of the lot known as 8012 $\frac{7}{8}$ South Vermont Avenue, to which no structural alterations had been made, the garages, and the parking area.

The complete occupancy record summarized in Fontecchio's affidavit shows clearly the predominantly transient nature of his rentals, typical of motor court operation. [R. 44.] The same affidavit shows that parking and storage space for automobiles, and other services customarily supplied by motor courts were furnished by Fontecchio to his guests.

It is apparent from the affidavit that the premises were being used in such a manner as to qualify them as tourist court or motor court under the provisions of the Los Angeles City Ordinance defining such operation [R. 39] and of the Housing Expediter's own regulations defining a motor court (Appendix p. 14) with the exception of the requirement which gives rise to this litigation, namely that a motor court must have been such on June 30, 1947.

In spite of the fact that four representatives of the Housing Expediter's office had inspected the premises, and that three of them had interviewed appellee's neighbors, and that one of them had inspected appellee's records [R. 22-24] no affidavits were filed controverting in any respect the facts related in Fontecchio's affidavit concerning the operation and physical appearance of the premises, the construction work which had been done, or the use made of the premises.

Appellee's motion for summary judgment was granted by the District Court and this appeal followed.

ARGUMENT.

I.

The Statute Does Not Require That a Motor Court Have Been Such on June 30, 1947, in Order to Be Free From Control.

The Housing and Rent Act of 1947 (50 U. S. C. A., Sec. 1881, *et seq.*) simply excludes from its operation “. . . any motor court, or any part thereof; . . .” (Sec. 202(c)(2).) Contrary to the impression produced by Appellant’s Brief (p. 19) there is no language referring to any specific date.

In 1948 this language was repealed and re-enacted with the addition of a reference to trailers and trailer space, and if the 1947 Act be considered to speak only of a period immediately preceding its enactment, then, by the same principle the 1948 Act should speak as of March 31, 1948, at which time appellee’s establishment was in full operation as a motor court.

When Congress wanted to fix a status-determining date it knew how to do so as shown by the 1949 legislation, defining a “hotel” for certain purposes as “. . . any establishment which on June 30, 1947 . . .” met certain defined standards. (Housing and Rent Act of 1949, Sec. 202(c)(1)(B); Appendix p. 13.) Significantly, the language relating to motor courts was unchanged by this act.

II.

The Legislative History of the Motor Court Exclusion Does Not Justify the Housing Expediter's Efforts to Provide an Administrative Amendment to the Act.

There was no discussion either in committee or on the floor during the passage of the Housing and Rent Act of 1947 of any status-determining date for motor courts.

After the passage of the Act the Housing Expediter by "interpretation" took the position that a motor court must have been such on June 30, 1947, to be decontrolled. This construction of the statute was vigorously resisted by appellee as soon as it was sought to be applied to him.

Had the Housing Expediter been sure of his ground the normal action would have been (1) to incorporate the provision into his regulations, and (2) if challenged, present the matter to the next Congress and secure express legislative approval of his stand.

Instead, nothing was said relating to this matter in the 1948 Committee Hearings to which appellant so grandiosely refers (Brief p. 23, and note) as an "exhaustive review" of the Expediter's administration; after the 1948 legislation became effective the Expediter put the provision in his regulations and managed to have it referred to in a rump session between certain selected members of Congress and of the Housing Expediter's staff, and even here the reference simply is to practices which would clearly be an evasion of the statute under any circumstances.

Such caution on a matter claimed to be so important demonstrates, we believe, that the Housing Expediter really felt that if the matter had been presented to Congress his "interpretation" would have been rejected. And

the passage of the 1949 legislation, inserting a status-determining date as to certain hotels, but leaving the motor court provisions untouched was such a rejection.

Appellant's suggestion (Brief pp. 23-24) that the language quoted from the Senate and House Committee reports of 1948 constitutes an approval of the Housing Expediter's interpretation is disingenuous.

Up to the time the Committees wrote, the June 30, 1947 requirement was a matter of interpretation only; the Committee language refers to what the Expediter had previously done by *regulation*. The Committee comment actually refers to the Housing Expediter's decontrol of trailers and trailer space *by regulation* on January 5, 1948. (12 F. R. 8660.)

Appellant's reliance upon an *ex post facto* discussion between certain members of Congress and select members of the Housing Expediter's staff as a guide to the intention of the *whole* Congress in extending the 1947 Act is nothing short of extraordinary. Should the principle contended for be sanctioned by this Court a Congressional minority could always become the majority by holding "interpretative" sessions after the passage of legislation.

Appellant's argument for June 30, 1947 as a status-determining date, based upon the Congressional provision fixing maximum rents as those established under the Emergency Price Control Act of 1942, in effect overlooks two significant elements in the problem before this Court. *First*, the provision relates only to "controlled" housing accommodations, and to that extent appellant begs the question. *Second*, the buildings here involved were not subject to the Emergency Price Control Act of 1942, as amended, or to its subsidiary regulations, on June 30,

1947, since on that date they were neither rented nor offered for rent. [R. 35-40.] *Emergency Price Control Act of 1942*, Sec. 302(f). (Appendix p. 13.)

III.

To Hold That Appellee's Establishment Was Not Subject to Control Will Neither Open the Door to Evasion nor Thwart the Congressional Purpose.

Appellee's basic proposition is that since the Congress has decontrolled housing accommodations when *used* as hotels, motor courts, or the like, a person owning accommodations which may be practicably operated as such, with or without structural change, may, if it does not affect the rights of existing tenants, devote such accommodations to a decontrolled operation rather than a controlled operation.

It was certainly never the Congressional intention to say that because in 1805 a structure had been built as a private dwelling house, it must either be not used at all or used only in accordance with the plans of its original designer, and yet to sustain appellant's position in this case would require the Court to reach this ultimate absurdity.

The Housing Expediter has never contended that a person may not permit housing accommodations to become vacant, remain vacant, and, when the building is empty, devote it entirely to a business use, such as offices. In principle there can be no objection to turning the same vacant building into a hotel or motor court. Indeed, the case at bar is stronger than that supposed since, as has been noted, the accommodations here involved had been withdrawn from the housing market prior to the passage of the 1947 Act.

Appellant's argument that Congress did not intend to foster the creation of transient accommodations is un-

tenable in view of the fact that Congress placed no restriction upon the end-use of accommodations built after February 1, 1947. To hold that the builder of a new motor court on October 1, 1947 was decontrolled but to deny to the owner of vacant property the right to commence a motor court operation after June 30, 1947, would be to ascribe to Congress an intent to create a limited monopoly in the motor court business and would be, it seems, to sanction an unconstitutional discrimination against the class to which appellee belongs.

IV.

The Suit Is Not One Against the United States. The Housing Expediter Is Not a Necessary or Indispensable Party.

Where the claim stated involves the assertion that the defendant, though an official of the United States, is acting *ultra vires* the statute, or under an unconstitutional statute, the suit is not one against the United States.

Mine Safety Appliances Company v. Forrester, 326 U. S. 371;

Land v. Dollar, 330 U. S. 731, 738;

Oklahoma v. Guy F. Atkinson Co. et al., 39 Fed. Supp. 93 (3 judge court).

If appellee were correct in claiming this to be a suit against the United States, that would be equally true of a suit against Tighe E. Woods, the Housing Expediter himself, and the result would be that there could be no judicial review of action by the Housing Expediter's Office since the immunity of the United States from suit can only be waived by Congress, not by the Executive Branch of the government.

Anderegg v. United States, 171 F. 2d 127.

The Housing Expediter is not an indispensable party to a suit such as this. The best analysis of the cases cited by appellee is to be found in *Neher v. Harwood*, 128 F. 2d 846, where this Court distinguishes between (1) situations in which the officials were acting within the area of discretion given them by a valid statute, in which cases joinder of the superior officer was indispensable so that he could take new independent action or correct erroneous action of his subordinates, and (2) situations in which the action taken was unauthorized either because beyond the authority given by statute or because the statute itself was unconstitutional.

In the case at bar the action taken is *ultra vires* the statute and the superior is not indispensable. In this the case is like *Colorado v. Toll*, 268 U. S. 228 where the superior's regulation, *ultra vires* the statute, was interfering with contractual rights. *Williams v. Fanning*, 68 S. Ct. 188, broadens the second class since the petitioner's claim there was ". . . that they had been deprived of the hearing to which they were entitled and that the fraud order was without the support of substantial evidence" While the first branch of the claim may raise constitutional questions it is clear that the second does not, and is a matter which would seem to be within the area of statutory discretion.

In any event appellees' claim that judgment against him in this action would "interfere with the public administration" is absurd. Such a judgment will necessarily be based on a decision that he is acting beyond his statutory authority and beyond that of his superior. Such administration is public only in the sense that it is not concealed.

V.

Where the Controversy Between the Citizen and the Agency Is as to a Matter of Statutory Construction and Where the Agency Has Not Purported to Require a Resort to It for Determination of Such Questions an Action for Declaratory Relief Is Permissible.

Section 202(c) of the Housing and Rent Act of 1947 excludes certain categories of housing accommodations from control by definition. Accommodations not so excluded are called "controlled housing accommodations." Section 204(b) of the Act making certain conduct unlawful relates only to controlled housing accommodations. Without more the statute is self-executing.

That it was intended by the Congress to be self-executing was demonstrated in the debate on the Senate floor.

During a discussion of possible maladministration of the provisions of the pending legislation it was pointed out that local boards were being given authority to decide upon general decontrol. At this point Senator Fulbright said:

" . . . Well they [the Local Boards] are the ones who will make the decision whether certain areas should be decontrolled. Besides, certain categories of housing, such as hotels, tourist courts, and so forth, are not covered." (*Congressional Record*, Vol. 93, p. 6281, June 2, 1947.)

And the Housing Expediter's authority to issue regulations was given in these limited terms:

"The Housing Expediter is authorized to issue such regulations and orders, *consistent with the provisions of this title*, as he may deem necessary to carry

out the provisions of this section and section 202(c).” (Emphasis supplied.) (*Housing and Rent Act of 1947*, Section 204(d).)

Hundreds of lawsuits have been brought and tried since July 1, 1947, in which status of accommodations under the Act is the major issue. Some are eviction cases in which statutory grounds for eviction need not be shown if the accommodations are decontrolled. Others are eviction cases in which the issue is, was the rent demanded but unpaid legal because of decontrol. Actions have been brought by landlords against their tenants to secure a declaration of decontrol and tenants have sought an opposite result.

In all such cases, appellee concedes that the Court entertaining the suit has jurisdiction to determine whether or not the housing accommodations are, or are not, subject to the Act.

The nature of the primary jurisdiction rule is such that, where it is applicable, no Court, anywhere, in any connection, can make the determination, or review it, unless the question has first been submitted to and decided by the administrative agency.

Accordingly, unless our construction of the statute is correct, the General Counsel, Office of the Housing Expediter was wrong when, purporting to construe the statute he said:

“Where, however, the local courts have ruled that this type of occupancy [where a purchaser, as part of a purchase contract, permits the seller to remain in

possession for a short period of time] does not involve a landlord-tenant relationship, and the parties acted in reliance upon the decision of the court, the question of decontrol of the particular housing accommodations is left for decision by the local courts.” [13 F. R. 5001, Part VI, Sub-part 7.]

There was and is an actual controversy between appellant and appellee occasioned by a difference as to the proper construction of the Act and this construction was not only persistently maintained by the agency prior to the institution of this suit, but, after its institution and on April 1, 1948, the Housing Expediter himself, with knowledge of this suit [R. 31-32] attempted to do, by regulation (13 F. R. 1861) what he had theretofore attempted to do by interpretation.

To secure a declaration of decontrol, plaintiff has not been required by regulation to seek an administrative remedy. On August 2, 1947, Amendment 2 to the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments was amended so as to make “optional” a report of decontrol for motor courts.

On April 1, 1948, even the provision for an optional report was done away with so far as motor courts were concerned. (Rent Regulation for Controlled Rooms, etc., Amendment 27, 13 F. R. 1861.)

It is common knowledge that even with respect to hotels, for which a report is required the Housing Expediter's office merely acknowledges the receipt of the

report, noting on it that the office does not pass upon eligibility for decontrol.

Under these circumstances we do not see how it can be contended that there was any administrative remedy available. The provisions of the Rent Procedural Regulation referred to in Appellant's Brief (pp. 14-16; Appendix, pp. 51-59) are simply not applicable to questions of decontrol.

The case here is substantially identical to *Skinner & Eddy Corp. v. U. S.*, 249 U. S. 557, in which the Interstate Commerce Commission had issued a rate order which the corporation thought lacked statutory authority. In disposing of the contention that the corporation should have sought administrative review the Court said (p. 562):

“ . . . But plaintiff does not contend that seventy-five cents is an unreasonably high rate, or that it is discriminatory or that there was mere error in the action of the Commission. The contention is that the Commission has exceeded its statutory powers; and that, hence, the order is void. In such a case the courts have jurisdiction to enjoin the enforcement of an order even if the plaintiff has not attempted to secure redress in a proceeding before the Commission.” Cf.:

Varney v. Warehime, 146 F. 2d 238, at p. 244, col. 1;

Columbia Broadcasting System v. U. S., 316 U. S. 407.

VI.

The Motion for Summary Judgment Was Properly Granted.

The purpose of Rule 56, F. R. C. P., providing for Summary Judgment is to dispose of cases where there is no genuine issue of fact, even though an issue may be raised formally by the pleadings.

Miller v. Miller, 122 F. 2d 209;

Fletcher v. Krise, 120 F. 2d 809 (cert. den.) 314 U. S. 608, 62 S. Ct. 88.

It rests upon the party opposing summary judgment at least to specify some opposing evidence which it can adduce and which would change the result of the evidence, including admissions, adduced by the moving party.

Radio City Music Hall Corp'n. v. U. S., 135 F. 2d 715.

Appellant claims (Brief pp. 10-12) that there were material issues of fact, namely: (1) whether or not the premises were being operated as a motor court; (2) which of the buildings on the whole lot owned by appellee were being used in the motor court business; and (3) whether or not appellant threatened to and would, unless restrained, direct the commencement of and commence an action against appellee to restrain him from collecting rents in excess of appellant's order.

The so-called issues (1) and (2) above were raised only by appellant's answer denying the factual allegations of the complaint for "lack of information or belief." [R. 14, par. III and IV.] The full facts concerning the operation and physical appearance of the premises, the construction work which had been done, and the use made

of portions of the lot which were not used in the motor court business were set forth in detail in the affidavit of J. Fontecchio [R. 33-54] and the judgment carefully defined the portions of the lot and structures which were and were not part of the motor court. [R. 26-28.] None of the evidentiary facts in this affidavit were denied, although it appeared from the supplemental affidavit of J. Fontecchio [R. 22-23] that four representatives of the Housing Expediter's office had visited and inspected the premises, and that three of them had interviewed appellee's neighbors, and from the supplemental affidavit of Austin Clapp [R. 24] that an employee of the Housing Expediter's office had examined appellee's rental records. It certainly seems that these investigations would have provided a basis for counter-affidavits on the part of appellant if any of the facts were questioned.

The so-called issue (3) above is one of semantics. Appellee admitted that unless restrained he intended to issue an order fixing maximum rents for the premises and alleged in his affidavit [R. 21] that he had no authority to commence or direct the commencement of an action, but that he did have authority to receive and investigate complaints and refer them to the Litigation Unit of the Office of the Housing Expediter for their consideration and action. The supplemental affidavit of Austin Clapp pointed out that the attorneys representing appellant in the trial court were members of the Litigation Unit of the Office of the Housing Expediter and that any complaints received by appellant would be referred by him to these same attorneys. This was not denied.

The chain of causation from the issuance of an order by appellant to the commencement of an action to enforce it, by way of appellant's receipt of a complaint and its referral to the Litigation Unit, was apparent. It was equally apparent that if a complaint were to be referred by appellant to the attorney who were vigorously asserting that the premises were not a motor court, they could hardly reverse their position and refuse to commence an action based upon the complaint. The injunctive provisions of the judgment were clearly within the area of the trial court's discretion.

Respectfully submitted,

BENT AND CLAPP,

By AUSTIN CLAPP,

Attorneys for Appellee.

APPENDIX.

HOUSING AND RENT ACT OF 1947 (Pub. L. 129, 80th

Cong., Ch. 163, 1st Sess.).

Section 202(c).

“The term ‘controlled housing accommodations’ means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

“(2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof;¹ . . .”

HOUSING AND RENT ACT OF 1949.

Section 202(c).

“The term ‘controlled housing accommodations’ means housing accommodations in any defense-rental area, except that it does not include—

* * * * *

“(1) . . . (B) . . . (2) the term ‘hotel’ means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; . . .”

“(2) any motor court, or any part thereof; any trailer or trailer space, used exclusively for transient occupancy.”

¹Provisions relating to trailers and trailer space inserted upon re-enactment of this subsection in 1948. (Housing and Rent Act of 1948, Public Law 464, Chap. 161, 80th Cong., 2d Sess.)

EMERGENCY PRICE CONTROL ACT OF 1942, AS AMENDED.
(50 U. S. C. A. 901, *et seq.*)

Section 302(f).

“The term ‘housing accommodations’ means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes”

RENT REGULATION FOR CONTROLLED ROOMS IN ROOM-
ING HOUSES AND OTHER ESTABLISHMENTS. 12 F.
R. 4302.

Section 1(b)(8)(iv), as amended by Amendment 2, 12
F. R. 5699.

“Every landlord of all such rooms referred to in this paragraph (8), except rooms in motor courts, shall file in the area rent office an application for decontrol of such rooms on a form provided by the Expediter within 60 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later.”

Section 1(b)(2)(i), as amended by Amendment 27, 13
F. R. 1861.

“(2) Decontrolled housing (a) Rooms in a hotel (b) rooms in establishments which were motor courts on June 30, 1947; (c) trailers (d) rooms in any tourist home (e) rooms in other establishments

“Reporting requirements. Every landlord of rooms referred to in (a), (d), and (e) shall file a report of decontrol”

Section 1 (preceding subsection (a).) 12 F. R. 4302.

“ ‘Motor Court, means an establishment renting rooms, cottages or cabins, supplying parking or storage facilities for motor vehicles in connection with such renting and other services and facilities customarily supplied by such establishments, and commonly known as a motor, auto, or tourist court in the community.’ ”

No. 12104

**In the United States Court of Appeals
for the Ninth Circuit**

**BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING
EXPEDITER, APPELLANT**

v.

J. FONTECCHIO, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION**

BRIEF OF APPELLANT

ED DUPREE,

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HUGO V. PRUCHA,

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FILED

MAY 21 1954

CLERK OF COURT

**U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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In the United States Court of Appeals for the Ninth Circuit

No. 12104

**BEN C. KOEPKE, INDIVIDUALLY, AND AS AREA RENT
DIRECTOR, LOS ANGELES DEFENSE-RENTAL AREA,
OFFICE OF RENT CONTROL, OFFICE OF THE HOUSING
EXPEDITER, APPELLANT**

v.

J. FONTECCHIO, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Appellant, defendant below, appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, granting plaintiff-appellee's motion for summary judgment in an action in equity for both declaratory judgment and injunctive relief. The action was first brought by appellee in the Superior Court of the State, in and for the County of Los Angeles, for a declaratory judgment that his housing accommodations were decontrolled by the Housing and Rent Act of 1947, as amended, and for an injunction re-

straining appellant, an Area Rent Director in Los Angeles, from establishing and enforcing maximum rentals for these housing accommodations (R. 1). The action was removed to the United States District Court on motion of defendant. Final judgment in favor of appellee was entered on September 13, 1948 (R. 26). Notice of Appeal was filed on October 21, 1948 (R. 29). The jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Procedure Code (28 U. S. C. A. 1291).

STATEMENT OF THE FACTS

The facts in this case are briefly as follows:

On March 26, 1948, the appellee filed suit in the Superior Court, Los Angeles County, against the defendant individually and as the Area Rent Director for the Los Angeles Defense-Rental Area, for a declaratory judgment that his housing accommodations were decontrolled by the Housing and Rent Act of 1947, as amended, and for an injunction restraining appellant from establishing a maximum rent thereon. Upon motion of appellant, this action was removed to the United States District Court.

A. *The complaint*

In his complaint (R. 2), appellee alleged that he was the owner of property located at 8012-8014 South Vermont Avenue, Los Angeles, within the Los Angeles Defense-Rental Area (Par. 1, R. 2); that appellant was the "duly appointed qualified and acting Area Rent Director" for the Office of the Housing Expediter, "an agency of the United States Govern-

ment," and that he has been administering the Housing and Rent Act of 1947 "pursuant to a delegation of authority so to do issued by the Housing Expediter" (Par. 2, R. 3). Appellee alleged that on March 1, 1947, the housing accommodations above described were vacated, and appellee proposed to convert them into a motor court; that he would do so after consultation with the Rent Control Office, and was advised that under the Regulations, it was permissible to conduct such a business (Par. 3, R. 3).

Appellee further alleged that subsequent to receiving this advice, he converted the housing accommodations into motor courts, creating eight units out of four, and that such conversion was begun after February 1, 1947, and was not completed until "approximately October 1, 1947" (R. 4). He further alleged that the premises, subsequent to October 1, 1947, were operated as a motor court (Par. 4, R. 3). Appellee alleged that the Act and the Rent Regulations issued thereunder became effective July 1, 1947, and that by their terms, motor courts were excluded from control (Par. 5, R. 5). He contended that by reason of said Act and Regulations, his premises were not subject to the Act or the Regulations, nor subject to any order of the Housing Expediter or the Defense Area Rent Director, in the exercise of his delegated authority (Par. 6, R. 5).

Appellee also alleged that on January 20, 1948, the appellant mailed a notice to him informing him that he intended to issue an order establishing maximum rents on the premises as converted (Par. 7, R. 5), and that on January 30, 1948, appellee filed objections

to the issuance of that order (Par. 8, R. 6). Appellee pleaded that on February 9, 1948, appellant issued and mailed to him, a notice stating that he intended to deny appellee's application for decontrol on the grounds that the premises were not operated as a "motel" on January 30, 1948 (Par. 9, R. 6). Appellee further pleaded that appellant intended to issue this order on February 18, 1948 (Par. 9, R. 6). The complaint alleged that unless restrained, appellant would issue an order establishing maximum rents for the motor court, and would order an action against appellee to restrain him from receiving amounts of rent in excess of any amounts established by the order (Par. 10, R. 6).

Appellee then pleaded that all such action to be taken by the Area Rent Director was taken at the express direction of the Regional Rent Director, "defendant's immediate superior in the Agency," and at the express direction of the Housing Expediter, and that, therefore, any petition to review such an order would be a futile gesture (R. 7). Appellee further pleaded that in the event that the Area Rent Director was reversed on an administrative appeal, the order would be prospective in operation only (R. 7). As a result, appellee claimed he would be left with the alternative of abandoning the collection of higher rentals, or running the risk of subjecting himself to an action for statutory damages for collection of rents in excess of those established by the orders, in the event his review of the Area Rent order proved to be unsuccessful (Par. 11, R. 7). In addition, appellee claimed he would be obliged to bring

successive actions in unlawful detainer because of tenants' refusal to pay appellee's established rent, and their insistence upon paying only the rent established by appellant (Par. XI, R. 7). According to the complaint, appellee was collecting rents at the rate of \$35.00 a day, whereas the orders which appellee anticipated would be issued, proposed to reduce those rents to \$12.00 per day (Par. XII, R. 8).

As relief, appellee prayed for:

1. A temporary restraining order, and a preliminary and final injunction against the defendant from issuing the proposed orders establishing any maximum rent for the said housing accommodations, and preventing him from taking any proceedings intended to compel a refund of rents already collected (R. 8).

2. An order to show cause why a preliminary injunction should not issue restraining the acts referred to in Paragraph 1, above; and

3. that the Court declare the right and duties of the parties under the Act and Regulations, with regard to the housing accommodations above-described (R. 8-9).

B. Motion to dismiss complaint denied

To this complaint, appellee filed a motion to dismiss upon the following grounds (Supp. R. 61-62):

1. that the Housing Expediter is an indispensable party to this action, and that appellant, as Area Rent Director, is merely a subordinate official who cannot be sued unless the Expediter is made a party;

2. that the official residence of the Housing Ex-

pediter is in Washington, D. C., and that the suit must therefore be brought here;

3. that the suit is one against the United States, to which it has not consented; and

4. that the complaint fails to state a claim upon which relief can be granted.

This motion to dismiss was denied by the Court below (See Tr.).

C. Answer

Appellant thereupon filed an answer to the merits alleging that the premises described in appellee's complaint had been registered with the Office of the Housing Expediter on October 14, 1947, on the form provided by this Office for housing accommodations subject to the Rent Regulations and Controlled Rooms in Rooming Houses; that the registration statements showed that the housing accommodations were located at 8012, 8012 $\frac{1}{2}$, 8012 $\frac{1}{4}$, 8012 $\frac{3}{4}$, 8012 $\frac{7}{8}$, 8014, 8014 $\frac{1}{2}$, 8014 $\frac{1}{4}$, 8014 $\frac{3}{4}$, South Vermont Avenue, Los Angeles (Par. I, R. 12).

Appellant admitted that he was administering the Housing and Rent Act and the Regulations issued pursuant thereto, but only to the extent authorized by Section 12-1600 of the Manual of the Office of the Housing Expediter, and pursuant to Rent Control Order No. 1, issued May 2, 1947 (Par. II, R. 13), 13 F. R. 2397. Based on lack of information and belief, appellant denied the conversations referred to in appellee's complaint, and denied all of the allegations of the complaint relating to appellee's operation of the "motel" (Pars. III & IV, R. 14). Appellant ad-

mitted that the Housing and Rent Act of 1947 and its amendment provided for decontrol of motor courts or any accommodations in motor courts which were such on June 30, 1947 (Par. V, R. 14-15).

Appellant alleged also that contrary to the appellee's complaint, the housing accommodations referred to were and are subject to the Housing and Rent Act of 1947, as amended, and Regulations and orders issued thereunder (Par. VI, R. 15). Appellant admitted the mailing of notices proposed to issue an order fixing maximum rents for said housing accommodations described as Room Nos. 1 to 9, inclusive, located at the address referred to in Paragraph I, above (Par. VII, R. 15). Appellant denied that appellee had ever filed objections to the issuance of the orders, but admitted he had filed an "Application for Decontrol of accommodations in hotels and tourist homes" (Par. VIII, R. 16). Appellant admitted that he had mailed a notice advising appellee that a preliminary investigation and other available information showed that all units in the housing accommodations were not subject to decontrol, and that if no reply and supporting evidence was filed in ten days, he may enter an order setting forth appellee's ineligibility for decontrol (Par. IX, R. 16). Appellant also admitted that he continues to contend that appellee's housing accommodations are not decontrolled (Par. IX, R. 16-17). Appellant admitted that he intended to establish maximum rents for the housing accommodations, but denied that he intended to direct the filing of an enforcement suit against appellee (Par. X, R. 17).

Appellant specifically denied that appeals from his orders are of no avail; specifically denied that any order issued by him would be automatically affirmed; and alleged that his orders had been reversed in both administrative appeal and review proceedings (Par. XI, R. 17). Appellant further denied that in all cases, the reversal of any order issued by the Rent Director takes effect only prospectively, but on the contrary, was of the belief that an order of reversal if granted in this case would be retroactive in effect (R. 17). Appellant also alleged he lacked adequate information and belief to admit or deny that tenants would refuse to pay rent in excess of the maximum, or that appellee would be subject to the filing of successive actions in unlawful detainer, or that tenants would assert the validity of the order to defeat actions by appellee for non-payment of rent (Par. XI, R. 17). Finally, appellant denied the allegation that by issuance of the order, appellee would suffer irreparable injury (Par. XII, R. 19).

D. Plaintiff's motion for summary judgment granted

Appellee thereupon moved for a summary judgment on the ground that these premises described in the complaint are and have been a motor court since October 1, 1947, and that the same are not "controlled housing accommodations" within the meaning of the Act and its amendment (R. 19-20). In support thereof, appellee filed his affidavits and those of his attorneys (R. 22-24, 33-57). Appellant filed an affidavit in opposition to the motion for summary judgment, in which he stated that he was the Area

Rent Director for the Los Angeles Defense-Rental Area, and that it was not within his authority to commence or direct the institution of legal proceedings for the purpose of enforcing the Act and the Regulations; that his authority was limited to the receipt and investigation of complaints, and upon information, to refer suspected violations to the "Rent Unit of the Office of the Housing Expediter for their consideration and account"; and that he had no intention of exceeding his authority or scope of his duties (R. 21). In addition, appellant opposed the motion for summary judgment upon the grounds stated in the motion to dismiss (Supp. R. 61).

After consideration of all the records and files in the action, the Court, on September 13, 1948, entered an order granting the motion for summary judgment on the ground that there was no genuine issue as to any material fact (R. 25). From that judgment, appellee appeals (R. 29).

SPECIFICATIONS OF ERROR

1. The Court below erred in granting appellee's motion for summary judgment because there were material issues of fact presented by the pleadings.

2. The Court below erred in granting judgment for appellee, and restraining appellant in the performance of his official duties, since the appellee had an adequate remedy at law and failed to exhaust his administrative remedies.

3. The Court below erred in entering judgment against appellant on the ground that the premises herein were not controlled housing accommodations,

but were exempt within the meaning of Section 202 (c) (2) of the Act.

4. The Court below erred in granting judgment for appellee herein because Tighe E. Woods, the Housing Expediter, was an indispensable party to this action, but was not joined as a party.

5. The Court below erred in granting judgment against the United States, the real party in interest, in an action in which it had not consented to be sued.

6. The Court below erred in failing to dismiss the complaint against the appellant on the ground that it failed to state a claim upon which relief could be granted.

7. The Court below erred in granting judgment for the plaintiff appellee.

ARGUMENT

I

The pleadings and papers heretofore filed in this action present material issues of fact barring summary judgment

The Court below erred in granting appellee's motion for summary judgment because the papers and pleading heretofore filed in this action present material issues of fact to be tried.

The appellee in his complaint alleged that the premises were being operated as a motor court (Par. 3, R. 3-4). In his answer, appellant, basing his denial on lack of information and belief, denied that this allegation was true (R. 14), thereupon placing this material question of fact in issue.

Moreover, The property which is subject of this cause of action consists of some nine buildings

and an iron shelter for automobile protection (R. 34). Some of the buildings are tenant-occupied, some are employee-occupied, some are owner-occupied, and others are used solely for business (R. 35). Furthermore, some of the buildings have been altered, and appellee claims that by reason of such alteration, they are subject to decontrol (R. 37). Others have not been altered, and the appellee claims that they are nevertheless subject to decontrol (R. 37).

Thus for example, in paragraph IV of his complaint, the plaintiff alleges that he altered the premises, converting "said housing accommodations, and made eight housing units out of what had been four units * * *" (R. 3). In his affidavit in support of the motion for summary judgment, the plaintiff offers to prove that there are nine units which have been created (R. 5). Furthermore, in paragraph III of his complaint he states that "he proposed to convert said housing accommodations and to use them in the conduct of the business of a motor court" (R. 3). But in his affidavit, he swears that "no change was made in the construction of the building known as 8012-7/8 * * *". Nevertheless, he lists that building as part of the motor court which he claims was decontrolled, although no change was made in the character of that building, no alterations were undertaken, nor were any completed.

From these confused and inconsistent statements made by appellee with respect to the character of these buildings, and in view of appellant's denial of Paragraphs III and IV of the complaint there can be little question but that substantial issues of fact have

been presented that can be resolved only after trial.

Furthermore, in his complaint, appellee alleges that unless restrained, appellant threatens to and will do the following things: (a) issue an order fixing the maximum rent for the housing accommodations; and (b) direct commencement of and commence an action against appellee to restrain the latter from demanding and receiving rents in excess of those fixed by appellant's order (Par. X, R. 6). In the answer, appellant admits the allegations contained in paragraph (a), but denies the allegations contained in paragraph (b) (Par. X, R. 17). Nevertheless, the decree in this case restrains the appellant from "taking any step or proceeding tending to or attempting to enforce any order * * *" (R. 28).

It will thus be seen that on its face, the denials in the answer to the allegations contained in the complaint raised genuine issues of fact which must be tried by the Court below. In addition, it should be noted that the answer denies that the housing accommodations involved in this case are a motor court entitled to decontrol (Par. VI, R. 15). That issue too, as we will see hereafter, is also one of material fact which should be disposed of only after trial, and not upon affidavits as was done in this case. We think that the rule which has frequently prevailed in cases between individual litigants barring summary judgment where a genuine issue of fact exists to be tried, should particularly apply to a case where an individual has brought suit against the United States or any of its agencies. This principle was summed up

by the Supreme Court in the case of *Eccles v. Peoples Bank*, 333 U. S. 426, 434, where it was said:

A determination of administrative authority may of course be made at the behest of one so immediately and truly injured by a regulation claimed to be invalid, that his need is sufficiently compelling to justify judicial intervention even before the completion of the administrative process. But, as we have seen, the Bank's grievance here is too remote and insubstantial, too speculative in nature, to justify an injunction against the Board of Governors, and therefore equally inappropriate for a declaration of rights. This is especially true in view of the type of proof offered by the Bank. *Its claims of injury were supported entirely by affidavits. Judgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous.* Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgment. Modern equity practice has tended away from a procedure based on affidavits and interrogatories, because of its proven insufficiencies. Equity Rule 46 forbade such practice save in exceptional cases. [Italics added.]

As this Court said in *Gifford v. Travelers Protective Ass'n.*, 153 F. 2d 209, 211:

The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact, and not how that issue should be determined.

In view of the foregoing, it was clearly error for the Court below to grant summary judgment in this case.

II

The Court below erred in granting judgment to appellee and restraining appellant in the performance of his official duties since the appellee has an adequate remedy at law, and has failed to exhaust his administrative remedies

At the outset, this Court's attention is directed to the allegation in the appellee's complaint which states "that any request to the Regional Rent Administrator to refuse the defendant's order or any appeal from defendant's order or from the Regional Rent Administrator's order on review of defendant's order to the Housing Expediter or to the Acting Housing Expediter would be of no avail and would result in the affirmance by them of defendant's order" (Par. XI, R. 7). Without dispute therefore appellee recognized that an administrative review had been provided to him from the Area Rent Director's order, but he failed to avail himself of that review because he thought it would be of no benefit to him. This does not affect the rule requiring exhaustion of administrative remedies.

Objection is made to the administrative hearing upon the ground that it is before the same authority which has preferred the charges and that it cannot be expected, therefore, to be fair and impartial and that the Act does not provide for judicial review of the Board's determination on the hearing. We cannot agree that courts should assume in advance that an administra-

tive hearing may not be fairly conducted. (*Fahey v. Mallonee*, 332 U. S. 245, 256.)

After having defined a "motor court" the Housing Expediter has afforded all landlords who disagree with him as to whether or not their properties are controlled, adequate opportunity for appeal and review, thereby affording them the due process required by the cases cited. The Housing Expediter has issued Part 825, Rent Regulations Under the Housing and Rent Act of 1947, as amended (13 F. R. 5706) and also Part 840, Revised Rent Procedural Regulation 1 (13 F. R. 2369) under the authority granted to him by Section 204 (d) of the Act. They provide for the issuance of rental orders by the Area Rent Director (825.5) on petition of the landlord for an adjustment or other relief (840.2), (*infra* p. 62). Provision is made for presentation of evidence to the Area Rent Director (840.8, 840.9, 840.10), for review by the Regional Housing Expediter (840.11, 840.12, 840.13) and Appeal to the Housing Expediter (Subpart B of Part 840). By these means ample opportunity is given for exhaustive consideration of all the available evidence with hearing in appropriate cases, which may also be treated "as a request for other relief pursuant to the regulation appealed from * * *" (840.34), (*infra* p. 62).

1. The failure of the defendant to resort to administrative remedies provided by the Housing Expediter precluded resort to the Court below for declaratory relief (*Aircraft & Diesel Corporation v. Hirsch*, 331 U. S. 752). "The rule is well settled that a person must first exhaust the prescribed ad-

ministrative remedy before he can seek any relief in the courts" (*Gates v. Woods*, 169 F. 2d 440, 442 (C. C. A. 4th), decided under the Housing and Rent Act of 1947); see too, *Koster v. Turchi* (C. C. A. 3d), decided February 24, 1949. Moreover, as the Supreme Court held in *Yakus v. United States*, 321 U. S. 414, 445-446, a defendant must first exhaust his administrative remedies even in a case where the defendant asserts the unconstitutionality of maximum prices he is charged with having violated. The obligation to exhaust all avenues of relief provided by regulation may not be avoided even by charging that the statutory maximum rentals are invalid, or that an appeal as provided would be futile, nor that the appeal would be useless, because it is before the same organization that issued the order. As stated by this Court in *La Verne Co-op. Citrus Ass'n v. United States*, 143 F. 2d 415, at p. 419:

A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. *Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 58 S. Ct. 459, 82 L. Ed. 638; *United States v. Superior Court*, 19 Cal. 2d 189, 120 P. 2d 26.

See also, *Maccauley v. Waterman Steamship Co.*, 327 U. S. 540; *Anderson v. Schwellenbach*, 70 F. Supp. 14 (N. D. Cal. 3 judge court).

Thus, it is submitted that the Court below improperly entertained this action because the defendant had not previously sought relief from the Expediter by the available administrative procedures.

2. Not only did appellee fail to exhaust his administrative remedies, but the action brought here is premature in any event.

Where the acts of a public officer are involved, there is a presumption that he will act in accordance with his oath and responsibilities. This is a recognized principle which has repeatedly led courts to refuse to issue injunctions against an administrative officer merely because as in this case it is feared that he will improperly perform his statutory duty. As was said in *Eccles v. Peoples Bank, supra*:

Where administrative intention is expressed but has not yet come to fruition (*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324, or where that intention is unknown (*Great Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 429-30), we have held that the controversy is not yet ripe for equitable intervention. Surely, when a body such as the Federal Reserve Board has not only not asserted a challenged power but has expressly disclaimed its intention to go beyond the legitimate "public interest" confided to it, a court should stay its hand. (333 U. S. at p. 434.)

In *First National Bank of Albuquerque v. Albright*, 208 U. S. 548, at p. 553, Justice Holmes speaking for the Supreme Court said:

It is not for a court to stop an officer of this kind from performing his statutory duty for fear he should perform it wrongly.

The Court re-emphasized this point in *White v. Macy*, 246 U. S. 606, at p. 609 when it said:

Again it is true that Court will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law.

More recently, the Supreme Court in *Yakus v. United States*, 321 U. S. 414, 439 said:

Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order of interlocutory injunction to one who had failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process" (p. 439).

Other cases to the same effect are:

Dalton Adding Machine Co. v. State Corporation Commission, 236 U. S. 699.

Natural Gas Pipeline Company v. Slattery, 302 U. S. 300.

Bradley v. City of Richmond, 227 U. S. 477, 485.

Gulf Refining Company v. Phillips, 11 F. 2d 957 (C. C. A. 5th).

Stork Restaurant Corporation v. McCampbell, 55 F. 2d 687 (D. C. N. Y.).

Since appellee had an adequate and complete remedy at law, the court below was in error in granting equitable relief.

III

The Court below erred in holding that the premises herein operated as a motor court were decontrolled pursuant to Section 202 (c) of the Act, although the premises were not operated, and by plaintiff-appellee's admission were not identified as such on June 30, 1947

The decontrol provision of Section 202 (c) of the Housing and Rent Act of 1947 (50 U. S. C. A. 1892 (c) and its 1948 amendment (Pub. L. 464, 80th Cong. 2d Sess. Sec. 201) provide that certain controlled housing accommodations, among them motor courts, were to be decontrolled as of June 30, 1947. In order for housing accommodations to qualify for decontrol as a motor court pursuant to the Act, an accommodation must have been a motor court on that date. In accordance with that provision of the Act the Expediter has declared that the housing accommodations in the case at bar are not subject to decontrol, because they were not a motor court on June 30, 1947.

The appellee concedes that he did not operate the premises as a motor court on June 30, 1947 (R. 40). He contends, however, that pursuant to Section 202 (c) (2), *infra*, p. 47, the premises were decontrolled by virtue of operation as a motor court at any time after June 30, 1947, in this case on October 1, 1947. The Court below sustained that contention in its judgment (R. 26). The appellant maintains that this construction of the Act must be rejected for the following reasons:

1. The plain language of the Act is opposed to the construction given by the Court below.

2. The legislative history supports the appellant's construction of the Act.

3. The construction given by the Court below is contrary to the interpretations issued by the Expediter which are entitled to great weight here.

4. The construction given by the Court below would thwart the purposes of the Act.

5. The construction given by the Court below is contrary to judicial construction of similar provisions under the Emergency Price Control Act of 1942.

These contentions will be considered in order.

1. The plain language of the Act is opposed to the construction given by the Court below

The plain reading of the Act is opposed to the construction which the Court below gave to it. Section 204 (b) of the Act provides that no person shall demand or receive rent greater than that established under the Emergency Price Control Act "and in effect with respect thereto on June 30, 1947."

The maximum rent in effect on June 30, 1947, on the premises located at 8012-14 South Vermont Avenue, Los Angeles, was the rent previously registered for the housing accommodations by the appellee. Any other reading of the Act with respect to these premises would clearly distort the plain meaning of the words used.

The appellee concedes that these premises were not in fact nor were they operated as a motor court on June 30, 1947 (R. 40). The record is silent that any application for decontrol of these premises was duly made at any time after the original registration statement had been filed. If the statute means what it says, it is perfectly clear that these premises were subject to the Rent Regulation for Housing on June

30, 1947, and did not qualify as a motor court until October 1, 1947.

Section 202 (c) provides:

The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include * * *

(2) Any motor court or any part there;
* * *.

Pursuant to this provision of the Act, the Expediter issued a regulation (12 F. R. 4331) which provided in Section 1:

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following: * * *

(7) *Accommodations in hotels, motor courts and tourist homes* * * *

(ii) *Housing accommodations in motor courts* * * *.

In order to accept the construction urged by the appellee and accepted by the Court below it is necessary to rewrite the plain language of the statute. As quoted above Section 204 (b) of the Act provides that the maximum rent with respect to a housing accommodation must have been that "on June 30, 1947." In order to support the construction given the Act by the Court below that language must be amended to read "in effect with respect thereto on (or after) June 30, 1947." However, it is apparent that neither the appellee nor the Court below may rewrite the Act in the guise of interpreting it. If Congress had chosen to create a fluid period during

which landlords could convert controlled accommodations into decontrolled property, it could easily have said so. This it did not do.

It will be noted also that if accommodations are entitled to decontrol, it is only because of the exemption provided by the Act. To accept the construction of appellee, would require the exemption to be given a liberal interpretation. It is, however, a primary principle of statutory construction that exceptions to an Act are to be strictly construed (*McCauley v. Makah Indian Tribe*, 128 F. 2d 867, 879 (C. C. A. 9th); *Aragon v. Unemployment Compensation Commission*, 149 F. 2d 447, 449 (C. C. A. 9th); *Phillips Company v. Walling*, 324 U. S. 490). "One of the general rules of statutory construction is that a proviso or exception in a statute is to be strictly construed, and one who sets up an exception must establish it as being within the words as well as the reason thereof" (*Jones v. H. D. & J. K. Crosswell*, 60 F. 2d 827, 829 (C. C. A. 4th)). The rule of construction of exemptions from remedial legislation was more recently stated by the Supreme Court in *Phillips Company v. Walling*, *supra*, as follows (at p. 493):

Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, given due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

Furthermore, this Court has held in *Aragon v. Unemployment Compensation Commission, supra* (149 F. 2d at p. 449), that not only must the exception be strictly construed, but that the burden of proving the construction is upon the person claiming the exemption.

2. The legislative history supports the appellant's construction of the Act

Not only does the language of the Act, but likewise its legislative history, and purposes amply bear out the Expediter's contention that the crucial date for decontrol was June 30, 1947. The whole subject of extending rent control and the Expediter's administration and interpretation of the Act was exhaustively reviewed by the Senate and the House of Representatives before amending the Act and extending it to April 1, 1948.¹

As part of this exhaustive review the Congress insisted upon a change in the Expediter's regulation pertinent to hotels as expressing more fully the intent of the Congress (See p. 8 Senate Report No. 896—80th Cong., 2d Sess.). However, no change was made regarding the Expediter's regulation and application of that regulation defining and decontrolling motor courts. On the contrary, in commenting upon its

¹ Hearing, Senate Banking and Currency Committee, 80th Cong., 1st Sess., January 30–February 24, 1947, 541 pages; Hearing, House Banking and Currency Committee on H. R. 2549, 80th Cong., 1st Sess., March 17–28, 1947, 608 pages; Hearing Subcommittee on Senate Committee on Banking and Currency, Part 1, January 17–26, 1948, Part 2, January 28–February 4, 1948, on Extension of Rent Control, 80th Cong., 2d Sess., and Hearings, House Banking and Currency Committee, February 3–10, 1948, 80th Cong., 2d Sess.

amendment to Section 202 (c) providing for decontrol of trailers and trailer spaces, the Senate Committee in its report said:

(b) Paragraph (2) of the present law, which decontrolled motor courts and tourist homes, has been expanded to include trailers and trailer space. This ratifies what already has been done by regulation of the Housing Expediter. (*Ibid.*)

The House Committee used substantially identical language in reporting the bill to the House when it said:

Paragraph (2), which decontrolled motor courts and tourists homes is changed so as to include trailers and trailer space. This ratifies what has already been done by regulation of the Housing Expediter. (p. 3 House of Representatives Report No. 1560, 80th Cong., 2d Sess.)

Apparently, not only was Congress aware of the regulation which provided for a cut-off date but likewise found no fault with its application. If the Congress had been dissatisfied with the Expediter's application of June 30, 1947, as a cut-off date presumably it would have amended the Act as to require the Expediter to modify his regulation for purposes of employing a more fluid period for decontrol rather than the fixed date selected. This it did not do although the Act was extensively amended in other respects. On the contrary, in reporting the amended Act to the Senate its Committee in Report No. 896 stated at p. 9:

Subsection (b) of Section 204 of the present law continues in general the maximum rents in effect on June 30, 1947 * * *.

There can be no serious dispute that Congressional reenactment of a law which has been interpreted by regulation constitutes ratification of that regulation (*Bowles v. Wheeler*, 152 F. 2d 34, 38 (C. C. A. 9th); *Porter v. McCullough*, 154 F. 2d 876 (C. C. A. 9th); *Pinkus v. Porter*, 155 F. 2d 90, 93 (C. C. A. 7th). In the *Wheeler* case, *supra*, this Court speaking through Judge Bone reviewed a legislative situation similar to the case at bar in that extensive hearings were held by the Congress on the point at issue in reenacting legislation. Holding that such interpretations have been given binding effect by Congressional approval Judge Bone said:

With this frank and illuminating explanation and interpretation of departmental procedure before it, Congress extended the life of the Act. When reenactment of the statute occurs legislative ratification of the administrative interpretation may well be inferred. See *Green Valley Creamery v. United States*, 1 Cir., 108 F. 2d 342; *Brewster v. Gage*, 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488, 51 S. Ct. 510, 75 L. Ed. 1183. If Congress was averse to this type of enforcement operations, it could have amended the enforcement provisions but it did not. Courts are not barred from the use of such legislative history which are pertinent aids to statutory construction and legislative in intent.

In the *Pinkus* case, *supra*, the Court was concerned with the administrative subpoenas. The Administrator called the Court's attention to the fact that these subpoenas were explained to a Congressional

Committee not specifically concerned with the extension of the Price Control Act. The appellate court nevertheless considered that the reenactment of the Act providing administrative subpoenas in the light of this testimony was Congressional approval of such practice.

The re-enactment of the Act after such administrative construction was made known to Congress constitutes a legislative ratification of that interpretation (155 F. 2d at 93).

In addition to the usual reviews given to administrative regulations and interpretations of legislative acts, the Expediter appeared before a joint Congressional Subcommittee after the 1948 amendment had been enacted in order to ascertain whether the Act was being administered as was intended by Congress. This session was held on April 1, 1948 (Subcommittee of the Committees on Banking and Currency, U. S. Senate and House of Representatives), and was entitled Administrative and Policy Interpretation of the Housing and Rent Control Act of 1948. It was called for the "purpose of conferring with the Acting Housing Expediter, Mr. Tighe Woods, and selected members of his staff, about the Housing Expediter's administrative and policy interpretation of the Housing and Rent Control Act of 1948" (Vol. 1, p. 2, *supra*). In the course of that conference the Expediter was asked a series of questions regarding the administrative interpretation of the Act. In discussing the application of the Expediter's regulation pertinent to hotels, the following conversation occurred:

Senator CAIN. * * * I only have one question to raise in connection with Mr. Wolcott's feeling: What is your cut-off date?

Mr. DUPREE. June 30, 1947. That was the date that the Housing and Rent Act came into existence.

Senator CAIN. Well, would there be reason, Mr. Dupree, for putting the cut-off date as the effective date of the new law?

Mr. DIGGLE. Yes, sir, there would be. There have been so many attempts to circumvent the Housing and Rent Act of 1947 by putting out a sign in front calling it a hotel.

Senator CAIN. Well, we are not in sympathy with any of that business, and we will support you gentlemen in that respect. * * *

From the foregoing there can be no question that the Congress was fully informed that since July 1, 1947, the Housing Expediter has been using June 30, 1947, as the effective date for housing accommodations to qualify for decontrol, and that the Congress approved use of that date.

3. The construction given by the Court below is contrary to the interpretations issued by the Expediter which are entitled to greater weight here

Shortly after the enactment of the Housing and Rent Act of 1947 the General Counsel in his monthly letter for September 1947, issued an interpretation regarding Section 1 (b) (8) (ii) in respect to motor courts. In that interpretation he said:

In order that property may be decontrolled as a motor court, it must have been a motor court on June 30, 1947. If it were not a motor court on that date it may not later be decon-

trolled as a motor court by reason of changes subsequent to that date.

In November 1947, in response to inquiries about partial decontrol, the General Counsel issued a second interpretation. In that interpretation he said:

An establishment was operated as a motor court on the maximum rent date, served transient guests, furnished services customarily supplied by motor courts in the community, and was registered on the DH-D form. The occupancy later changed to permanent guests who furnished their own linens and required no maid service. As the permanent guests vacated, the cottages in the court are rented for transient occupancy with all the services originally furnished. The establishment has made application for decontrol. In commenting on post review concerning the above facts, we held that such an establishment could not be considered as part motor court and part otherwise. It was our opinion that the Housing and Rent Act of 1947 decontrols motor courts as a whole without regard to the nature or term of the renting within the motor court, that in such cases it is necessary to make a determination as to whether a motor court actually existed on June 30, 1947. We also pointed out the distinction between motor courts and hotels calling attention to the fact in the case of hotels only the individual rooms receiving the required services are decontrolled whereas in motor courts it is the motor court itself even though one of the rooms or units did not receive all of the services.

These interpretations were in existence and in effect at the time that the Congress considered amending

the Act. The Congress, as noted above amended the Act extensively but did not in any way change the Expediter's application of June 30, 1947, as the "cut-off" date. Consequently, on August 25, 1948, the Expediter issued Interpretation No. 2 (See, *infra*, p. 59), in which the Expediter again set forth the "test date for decontrol." That interpretation was published in the Federal Register (13 F. R. 5001). The rent regulation was also amended to conform to this interpretation.

The original regulation issued by authority of the Housing and Rent Act of 1947 provided that "This Controlled Housing Rent Regulation shall become effective July 1, 1947." In making the effective date of the regulation and the above provision of that regulation effective as of June 30, 1947, the Expediter was acting in accordance with Section 204 (b) of the Act which provided:

(b) During the period beginning on the effective date of this title and ending on the date this title ceased to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: * * *.

The amendment to the Act effective April 1, 1948 (Pub. L. 464, 80th Cong. 2d Sess.), amended Section 204 (b) but did not alter the effective date of June 30,

1947. So much of the amendment pertinent here reads as follows:

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceased to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947 * * *.

Based upon these interpretations the housing accommodations in this action did not come within the 202 (c) (2) exemption of "controlled housing accommodations" on June 30, 1947, and hence are subject to the Act.

Although the interpretation of a statute is not binding on the courts, it is entitled to great weight (*Skidmore v. Swift and Company*, 323 U. S. 134, 139-140), particularly "when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion * * *" (*Norwegian Nitrogen Company v. United States*, 288 U. S. 294, 315; see also, *United States v. American Trucking Association*, 310 U. S. 534, 549; *Missel v. Overnight Motor Transportation Company*, 126 F. 2d 98 (C. C. A. 4th), affirmed, 316 U. S. 572).

4. The construction given by the Court below would thwart the purposes of the Act

The most casual reflection will show the need for the cut-off date. Without it the possibilities of evading the control provisions of the Act are inexhaustible. In addition, the use of a system of decontrolling housing accommodations on a piece meal or day to day basis after June 30, 1947 would defeat the purposes of the Act. The objectives of the Act are "to prevent inflation and for achievement of reasonable stability in the general level of rents * * *" (Section 201 (b)). In speaking of the general level of rents the Congress obviously was referring to the level of rents on controlled housing accommodations. In achieving this stability the Congress was obviously not too concerned with motor courts, their creation, retention or demolition, since it exempted them from all control. The Congress was, however, concerned with the shortage of housing accommodations. In attempting to provide for the economic needs of the nation as a whole with regard to shelter and housing accommodations the Congress had two main reasons for decontrol. The first ground was the decontrol of hotels, motor court and tourist camps because the cost of operating those accommodations in terms of wages and services had increased out of all proportion. Furthermore, it was not concerned with the existence of a shortage in transient accommodations. On the other hand the Congress decontrolled new construction of housing accommodations in an effort to stimulate production of those accommodations in a market in which building and material costs had substantially increased since the termina-

tion of price control. There is no indication in the legislative history that the Congress ever intended the diversion of building materials from the field of residential construction into that for tourist courts, tourist camps, and motor courts. On the contrary, there is every indication that the Congress intended the exact opposite.

If the construction given to the statute by the Court below is sustained, there will be a premium awarded to all landlords to convert their premises from permanent housing accommodations into transient accommodations as motor courts or tourist camps. In order to sustain the Court below it would be necessary to distort the objectives of the Act by reading Section 202 (c) (2) in a vacuum. However, it is a cardinal principle of statutory construction that an act must be read in its entirety in order to achieve its purpose (*United States v. American Trucking Association*, 310 U. S. 534, 543). It is therefore necessary to read Section 202 (c) (2) and Section 204 (b) together in order to achieve "reasonable stability" and not to thwart the purposes of the Act by diverting permanent housing accommodations into the transient accommodation market.

On the other hand to adopt the ruling below we must impute to Congress the wholly unreasonable intention to stimulate the construction of motor courts, and to divert vitally needed construction supplies from housing accommodations. This we may not do.

By decontrolling motor courts which were in that category on June 30, 1947, the Congress recognized that there was no shortage, and that the operators of

them were entitled to increased revenue to meet increased costs of wages and services. Clearly, however, Congress was not interested in diverting these materials needed for new housing accommodations into the construction of motor courts, thus working at cross-purposes with itself.

It can readily be seen that by adhering to appellee's reasoning, the Act reaches absurd results, by sanctioning basic contradictions. It is respectfully submitted that this court will not adopt a construction of a statute that is contradictory, when a logical alternate exists consistent with the purposes of the legislation.

5. The construction given by the Court below is contrary to judicial construction of similar provisions under the Emergency Price Control Act of 1942

There can be no serious dispute with the Expediter's application of the "Maximum Rent Date Method" of establishing legal rents. Since the earliest days of rent control such method has been in use, and has been sanctioned by the Courts. *Chatlos v. Brown*, 136 F. 2d 490, 493 (E. C. A.); *Spaeth v. Brown*, 137 F. 2d 669, 670 (E. C. A.); *Taylor v. Brown*, 137 F. 2d 654, 659 (E. C. A.). Certainly there can be "no constitutional objection if Congress as a war emergency measure had itself fixed the maximum rents in these areas," *Bowles v. Willingham*, 321 U. S. 503, 517. This language applies equally to the Housing and Rent Act of 1947, *Woods v. Cloyd W. Miller Company*, 333 U. S. 138, 68 S. Ct. 421.

In enacting Section 204 of the said Act the Congress provided that it is unlawful to accept rent "greater than the maximum rent established under

authority of the Emergency Price Control Act of 1942, as amended, and *in effect with respect thereto on June 30, 1947*” (Section 204 (b), Emphasis added), see *infra*, p. 48. The Congress further provided that the Expediter “is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this Section and Section 202 (c)” (Section 204 (d)).

By authority of the cases above cited (p. 33) this method of control finds ample support in the Courts, especially the Emergency Court of Appeals. In *Chatlos v. Brown, supra*, the court recognized the complainant’s “proper” concession of the validity of the “Maximum Rent Method.”

Furthermore, complainant properly concedes that the Act “specifically authorized the Maximum Rent Date Method” of rent stabilization adopted by the Administrator in Maximum Rent Regulation No. 5. Rentals are thus rolled back and frozen as of an earlier date and at levels which landlords and tenants had worked out for themselves by free bargaining in a competitive market, prior to the time when defense activities had injected into the market an abnormal factor resulting, or threatening to result, in rent increases inconsistent with the purposes of the Act. This method has been used in England. See 5 and 6 Geo. V, c. 97; 10 and 11 Geo. V, c. 17; 2 and 3 Geo. VI, c. 71. The same is true in Canada. See Orders-in-Council, P. C. 8965, Nov. 21, 1941. Shortly before the passage of the Emergency Price Control Act of 1942, Congress prescribed the maximum

rent date method in the District of Columbia Emergency Rent Act, 55 Stat. 788, D. C. Code 1940, § 45-1601, et seq.

The same court in approving the former rent regulations recognized the authority of the Administrator to issue them within the expressed Congressional policy. In *Taylor v. Brown*, the Court said:

It is well within its power to clothe the Administrator with authority to ascertain the rental areas in which maximum rent regulation is required and to formulate in accordance with the standards in each such area. *United States v. Rock Royal Co-op.*, 1939, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446; *Sunshine Coal Co. v. Adkins*, 1940, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263; *Opp Cotton Mills v. Administrator*, 1941, 312 U. S. 126, 657, 61 S. Ct. 524, 85 L. Ed. 624; *Commonwealth & Southern Corp. v. Securities and Exch. Commission*, 3 Cir., 1943, 134 F. 2d 747.

It is thus clear that the appellee's contention that the cut-off date should be ignored cannot be sustained for the following reasons: First, because the plain language of the Act is opposed to the construction given by the Court below; second, because the legislative history supports the appellant's construction of the Act; third, because the construction given by the Court below is contrary to the interpretations issued by the Expediter which are entitled to great weight here; fourth, because the construction given by the Court below would thwart the purposes of the Act; and fifth, because the construction given by the Court below is contrary to judicial construction of similar provisions under the Emergency Price Control Act of 1942.

It is respectfully submitted that the Court below erred in finding for the appellee that it was not necessary for the housing accommodations in question to have been a motor court on June 30, 1947 to be eligible for decontrol.

IV

The Court below erred in granting judgment to the plaintiff-appellee herein against the defendant-appellant area rent director, who is a subordinate of Tighe E. Woods, the Housing Expediter, in whom all powers and duties pertaining to rent control are reposed by Section 204 (a) of said act, and is therefore an indispensable party to this action

The defendant appellant herein filed a motion to Dismiss this action in the Court below on the ground, among others, that he was a subordinate of the Housing Expediter, and any action taken by him was at the direction of the Expediter, and by virtue of his express delegation. Therefore, Tighe E. Woods, the Housing Expediter, is an indispensable party to the action, who is not within the jurisdiction of the Court. The court overruled said motion. It is respectfully submitted that in so holding the Court below was in error.

The Housing and Rent Act of 1947 vests all powers, functions, and duties in the Expediter (Sec. 204 (a)). The Expediter is also given the power to make such adjustments in such maximum rents as may be necessary to correct inequities, or further carry out the purposes and provisions of this title (Sec. 204 (b)). The Expediter is further authorized and directed to remove any maximum rents in any defense-rental area if, in his judgment, the need for continuing them no

longer exists (Sec. 204 (c)). The Expediter is authorized to issue such regulations and orders necessary to carry out the rent control provisions (Sec. 204 (d)). The Expediter is authorized to create local advisory boards which may make recommendations to the Expediter for decontrol of defense rental areas.

In his Complaint in the instant case, appellee in effect prayed for an injunction enjoining the defendant, (individually) and as Area Rent Director, his agents and employees and “all persons acting in concert” with him from enforcing or seeking to enforce rent ceilings and other provisions of the Act, so far as the premises herein are concerned (R. 3). Moreover, appellee asked for a declaratory judgment which would declare that defendant has no power, authority, or jurisdiction to issue any order of any kind with respect thereto. In addition appellee concedes that appellant’s action is “made at the express direction * * * of the Housing Expediter” (R. 7). Since the decree prayed for would by its terms necessarily require the Expediter himself to take action, as a person acting in concert with appellant, and in fact, specifically directing the latter and hence responsible for any action taken by him, it must be evident that the Expediter is an indispensable party within the ruling of this Court in *Neher v. Harwood*, 128 F. 2d 846, and the decisions of the Supreme Court in *Williams v. Fanning*, 332 U. S. 490, *Gnerich v. Rutter*, 265 U. S. 388; *Webster v. Fall*, 266 U. S. 507; *Warner Valley Stock Company v. Smith*, 165 U. S. 28; *Alcohol Warehouse Corporation v. Canfield*, 11 F. 2d

214 (C. C. A. 2d); *National Conference on Legalizing Lotteries v. Goldman*, 85 F. 2d 66 (C. C. A. 2d); *Jewel Production v. Morgenthau*, Secretary of the Treasury, 11 F. 2d 390 (C. C. A. 2d).

In *Williams v. Fanning*, *supra*, the Postmaster General, after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order directing the respondent, as postmaster at Los Angeles, where petitioners do business, to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all matter directed to petitioners, and to return it to the senders. Petitioners sued the local postmaster to enjoin him from carrying out the order. Motion to dismiss was made on the ground that the Postmaster General was an indispensable party, and granted by the lower courts. The Supreme Court reversed, and held that the motion to dismiss should be overruled. Speaking of *Gnerich v. Rutter*, *supra*, and related cases, the Court said (p. 493):

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require *him* to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. [Italics added.]

The Court then compared the facts and principles in those cases with the facts and principle laid down in *Colorado v. Toll*, 268 U. S. 228, and at the same

time, stressed the fact that there was no conflict between these two lines of cases, since the *Toll* case involved a situation where "relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain, or *interfere* with the *public administration*.'" *Land v. Dollar*, 330 U. S. 731, 738." [Italics added.]

The Supreme Court went on to say that the decree in the case before it was like the decree in the *Toll* case, since it will "effectively grant the relief desired by expending itself on the subordinate official who is before the Court." The Court declared that it was the local postmaster *alone* "Who refuses to pay money orders, who places the stamp 'fraudulent' on the mail, who returns the mail to the senders." Thus, as the Court further pointed out, if the local postmaster "desists in those acts, the matter is at an end. That is all the relief which petitioners seek." Comparing the case before it and the facts in the *Rutter* and related cases, the Court concluded as follows (p. 494):

The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutter* case. *No concurrence on his part is necessary* to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. [Italics added.]

When these principles are applied to the facts in the instant case, it becomes clear that the *Rutter* and related cases should control, rather than the *Toll* case.

As was pointed out above, the Housing and Rent Act of 1947 not only vests all powers, functions, and duties in the Expediter, but also the power to make such adjustments in such maximum rents as may be necessary to correct inequities, or further carry out the purposes and provisions of this title. The Expediter alone is further authorized and directed to remove any maximum rents in any defense-rental area if, in his judgment, the need for continuing them no longer exists.

Hence, in this case, unlike the *Fanning* case, we do not have a situation where relief can be granted against the subordinate employee named as a defendant without risk that the judgment would interfere with public administration of an Act designed to prevent runaway rent increases. It also falls squarely within the line of cases cited in *Williams v. Fanning*, at page 493, where "the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him."

This was the reasoning applied in *Whitehall v. Turchi* (E. D. Pa.), No. 8078, decided March 24, 1948, not reported, a case squarely in point, where the court said:

There is no doubt that if the Regulation is held invalid and the ruling sustained by the appellate courts, the administration of the Act

throughout the entire country will be affected and hence it cannot be said that the judgment awarded would not "interfere with the public administration." *Land v. Dollar*, 330 U. S. 731, 738. As a matter of fact, in that event the Regulation would have to be rescinded or changed. Otherwise, the Housing Expediter would be in the position of directing and requiring its subordinates, by a general regulation, to act contrary to the law. Therefore, "the decree granting the relief sought will" not only interfere with the public administration but will "require him (the defendant's superior) to take action." *Williams v. Fanning*, U. S. Supreme Court, decided December 8, 1947. Although such a decree would not in terms order him to do so, the matter is one of substance, and if the ultimate result of the decree would be to compel action by the superior, the superior is an indispensable party.

The Court continued in its analysis of this problem regarding actions against the Housing Expediter with a paraphrase from the case of *Gnerich v. Rutter*, illustrating the exact parallel between the holding in that case and the case at bar.

One of the cases referred to by the Supreme Court as evolving the principle upon which it rested its decision in *Williams v. Fanning*, *supra*, was *Gnerich v. Rutter*, 265 U. S. 388, and what was said in the opinion in that case can be paraphrased to fit the present case, "The act and the regulations make it plain that the (local Rent Directors) are mere agents and subordinates of the (Housing Expediter). They act under his direction and perform such

acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations.”

Such was also the holding of Judge Coxe in the case of *Prince v. United States of America, Office of the Housing Expediter*, etc., in dismissing a case in the District Court for the Southern District of New York (Civil No. 48-327) decided January 19, 1949, where the Court said:

I think that this proceeding must be dismissed. Without passing upon the other objections raised by the defendants, it is clear that the Housing Expediter is an indispensable party, for the relief sought by the plaintiffs “will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him” (*Williams v. Fanning*, 332 U. S. 490, 493).

The Defendants' motion to dismiss is accordingly granted and the plaintiffs' motion denied.

In *American Communications Ass'n. v. Schauffler*, 80 F. Supp. 400 (E. D. Pa.), an action was brought for injunctive relief to restrain the defendant individually and as Regional Director of the National Labor Relations Board, from conducting an election under the National Labor Relations Act. Sustaining a motion to dismiss, Judge Kalodner, speaking for

the majority of a three-judge court, said the following (at p. 401) :

We are of the opinion that the members of the Board are indispensable parties and that the plaintiff's failure to join them as parties defendant is fatal to the instant action. Accordingly the motion to dismiss must be granted on this score.

The decree sought by plaintiffs will, if issued, require the Board, the defendant's superior, to take action. This is evidenced if only by section 9 (c) (1). Accordingly the Board is an indispensable party and the rule as clarified in *Williams v. Fanning*, 1947, 332 U. S. 490, 68 S. Ct. 188, becomes applicable.

On the basis of these authorities, we submit that the Expediter is the indispensable party here.

V

The Court below erred in refusing to dismiss this action as one against the United States, in which it had not consented to be sued

The court below erred in refusing to recognize this action as one against the United States. In his motion to Dismiss (R. 62) the appellant urged that this action was one against the sovereign and one in which it had not consented to be sued. The court below, nevertheless, overruled appellant's objection and entered judgment for appellee.

No principle is better established than that the United States may not be sued in the courts of this country without its consent * * *. That the United States is not named in the record as a party is true. But the question

whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can be rendered. *Louisiana v. McAdoo*, 234 U. S. 627, 628, 629. See also, *Transcontinental & Western Airlines v. Farley*, 71 F. 2d 288, 290 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

Any judgment or decree which can be rendered in this case will plainly affect the rights of the United States. The grave need for the continuation of rent control was made clear by Congress in its declaration of policy under Section 201 (b) of the Housing and Rent Act of 1947, when it declared that it "recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas." With this vital public welfare at stake, it is plain that the Government is the real party in interest and the attempt made here to prevent Government officials from discharging their statutory responsibilities is in reality a suit against the United States.

This conclusion is thoroughly supported by controlling decisions of the Supreme Court and lower courts. (*Naganab v. Hitchcock*, 202 U. S. 473; *Wells v. Roper*, 246 U. S. 335; *United States v. Griffin*, 303 U. S. 226; *Mine Safety Appliance Company v. For-*

restal, 326 U. S. 371;² *United States Department of Agriculture v. Hunter*, 171 F. 2d 793 (C. C. A. 5th).

Even though the action in this case is against officers or agents of the United States, it is not one to enjoin individual action contrary to law, but rather a suit to restrain an officer of the Government in performance of his official duties and, therefore, it is an action against the United States.³ Such an action will not lie unless the United States has consented to be sued. Since the United States has not consented to be sued in this type of proceeding, and since it is an indispensable party to this case, this action against the Government officers must be dismissed. *Louisiana v. McAdoo*, *supra*; *Wells v. Roper*, *supra*; *Naganab v. Hitchcock*, *supra*; *Bryan v. United States*, 99 F. 2d 549 (C. C. A. 10th), certiorari denied, 305 U. S. 661; *Noce v. Edward C. Morgan Company*, 106 F. 2d 746 (C. C. A. 8th); *Wilson v. Wilson*, 141 F. 2d 599 (C. C. A. 4th); *International Trading v. Edison*, 109 F. 2d 825 (App. D. C.), certiorari denied, 310 U. S. 652;

² Suit to restrain Secretary of the Interior from carrying out the provisions of Act of June 27, 1902, c. 1157, 32 Stat. 400, controlling the disposition of pine lands ceded by the Indians is, in effect, a suit against the United States. *Naganab v. Hitchcock*, *supra*.

Suit to enjoin Postmaster General from annulling contract for collecting and delivering mail in Washington, deemed one against the United States. *Wells v. Roper*, *supra*.

Suit to set aside an order of Interstate Commerce Commission concerning railway mail pay is not primarily one against the Commission, but is primarily against the United States. *United States v. Griffin*, *supra*.

³ Cf. *United States v. Koike*, 164 F. 2d 155 (C. C. A. 9th); *Fleming v. Findlay*, 165 F. 2d 79 (C. C. A. 9th); *Fleming v. Goodwin*, 165 F. 2d 334 (C. C. A. 8th); *D'Oench v. Woods*, 171 F. 2d 112 (C. C. A. 8th).

Haskins Bros. & Company v. Morgenthau, Secretary of Treasury, et al., 85 F. 2d 677 (App. D. C.) ; *Krug v. Fox*, 161 F. 2d 1013 (C. C. A. 4th) ; *Howard v. United States*, 126 F. 2d 667, 668 (C. C. A. 10th), certiorari denied, 62 S. Ct. 1297 ; *Ainsworth v. Barn Ball Room*, 157 F. 2d 97 (C. C. A. 4th).

On the basis of the foregoing authorities the Court below erred in failing to dismiss the action as one against the United States in which it has not consented to be sued.

CONCLUSION

The appellant herein respectfully submits that the Court below erred in granting appellee's motion for summary judgment; that the judgment below should be reversed; and that the Court below should be directed to dismiss the complaint.

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APPENDIX

HOUSING AND RENT ACT OF 1947 (50 U. S. C. A. 1881 ET SEQ.) (PUBLIC LAW 129—80TH CONGRESS; CHAPTER 163—1ST SESSION)

DEFINITIONS

SEC. 202. As used in this title—

(a) The term “person” includes an individual, corporation, partnership, association, or any other organized group of persons, or a legal successor or representative of any of the foregoing.

(b) The term “housing accommodations” means any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes (including houses, apartments, rooming- or boarding-house accommodations, and other properties used for living or dwelling purposes) together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property.

(c) The term “controlled housing accommodations” means housing accommodations in any defense-rental area, except that it does not include—

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or

(2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or

(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect, or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations.

SEC. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until February 29, 1948.

(b) During the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such adjustments in such maximum rents as may be necessary to correct inequities or further to carry out the purposes and provisions

of this title: *And provided further*, That in any case in which a landlord and tenant, on or before December 31, 1947, voluntarily enter into a valid written lease in good faith with respect to any housing accommodations for which a maximum rent is in effect under this section and such lease takes effect after the effective date of this title and expires on or after December 31, 1948, and if a true and duly executed copy of such lease is filed, within fifteen days after the date of execution of such lease, with the Housing Expediter, the maximum rent for such housing accommodations shall be, as of the date such lease takes effect, that which is mutually agreed between the landlord and tenant in such lease if it does not represent an increase of more than 15 per centum over the maximum rent which would otherwise apply under this section. In any case in which a maximum rent for any housing accommodations is established pursuant to the provisions of the last proviso above, such maximum rent shall not thereafter be subject to modification by any regulation or order issued under the provisions of this title. No housing accommodations for which a maximum rent is established pursuant to the provisions of the last proviso above shall be subject, after December 31, 1947, to any maximum rent established or maintained under the provisions of this title.

PUBLIC LAW 464—80TH CONGRESS; CHAPTER 161—2D
SESSION; S. 2182

TITLE II—MAXIMUM RENTS

SEC. 201. Section 202 (c) of such Act, as amended, is amended by striking out paragraphs (2) and (3) thereof and inserting in lieu of such paragraphs the following:

“(2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof; or any

tourist home serving transient guests exclusively, or any part thereof; or

“(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; or (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; or (C) the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations; or

“(4) nonhousekeeping, furnished housing accommodations, located within a single dwelling unit not used as a rooming or boarding house, but only if (A) no more than two paying tenants, not members of the landlord's immediate family, live in such dwelling unit, and (B) the remaining portion of such dwelling unit is occupied by the landlord or his immediate family.”

SEC. 202. (a) Section 204 (a) of such Act, as amended, is amended by striking out “March 31, 1948” and inserting in lieu thereof “March 31, 1949.”

(b) Section 204 (b) of such Act, as amended, is amended to read as follows:

“(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations.

REVISED RENT PROCEDURAL REGULATION NO. 1. PART
840 (13 F. R. 2369)

§ 840.8. *Action by the Area Rent Director on petitions for adjustment of other relief.* (a) Upon receipt of a petition for adjustment or other relief, and after due consideration, the Area Rent Director may either:

(1) Dismiss any petition which fails substantially to comply with the provisions of the applicable maximum rent regulation or of this part; or

(2) Grant or deny, in whole or in part, any petition which is properly pending before him; or

(3) Notice such petition for oral hearing to be held in accordance with § 840.10; or

(4) Provide an opportunity to present further evidence in affidavit form, in connection with such petition.

(b) An order entered by an Area Rent Director upon a petition for adjustment or other relief, or an order entered by an Area Rent Director on his own initiative or upon remand, shall be effective and binding until changed by further order and shall be final subject only to application for review or appeal as provided in § 840.11 or § 840.14 and following. An order entered by an Area Rent Director may be revoked or modified at any time, *Provided, however*, Due notice of the intention so to revoke or modify was previously given to all persons subject to such order, except as provided in § 840.11 (a).

(c) Upon remand of a proceeding to the Area Rent Director by the Regional Housing Expediter pursuant to § 840.12 or by the Housing Expediter pursuant to § 840.24, the Area Rent Director shall proceed in accordance with the order of remand and at the conclusion of such proceedings shall issue an appropriate order. Review of an Area Rent Director's order issued after remand shall be only by appeal to the Housing Expediter pursuant to § 840.14.

§ 840.9. *Evidence not subject to landlord's control.* In any proceeding before an Area Rent Director, the landlord may file a statement in affidavit form setting forth in detail the nature and sources of any evidence not subject to his control, but subject to the control of the Housing Expediter, upon which the landlord believes he can rely in support of the facts alleged in his petition or objections. Such statement shall

be accompanied by an application for assistance by way of interrogatories or otherwise, in obtaining documentary evidence or evidence of persons not subject to the control of the landlord, showing in every instance what material facts would be adduced thereby. Such application, if calling for the evidence of persons, shall specify the name and address of each person, and the facts to be proved by him, and if calling for the production of documents, shall specify them with sufficient particularity to enable them to be identified for purposes of production. Any such application for assistance must be directed to evidence subject to the control of the Housing Expediter.

§ 840.10. *Oral testimony*—(a) *Requests for oral hearing*. In most cases, evidence in proceedings before the Area Rent Director will be received only in written form. This procedure is most conducive to the fair and expeditious disposition of such proceedings. However, the Area Rent Director may, upon his own initiative, direct the receipt of oral testimony or the landlord may request that oral testimony be taken. Such request shall be accompanied by a showing as to why the filing of affidavits or other written evidence will not permit the fair and expeditious disposition of the proceeding. In the event that an oral hearing is ordered, notice thereof shall be served on the landlord not less than five (5) days prior to such hearing. The time and place of hearing shall be stated in the notice. A presiding officer shall be appointed by the Area Rent Director with all necessary powers to conduct the hearing. Any such oral hearing may be limited in such manner and to such extent as is deemed appropriate to the expeditious determination of the proceeding.

(b) *Stenographic report of oral hearing.* A stenographic report of the oral hearing shall be made, a copy of which shall be available for inspection during business hours in the appropriate defense-rental area office.

*Landlord's application for review of Area Rent
Director's action*

§ 840.11 *Landlord's application for review.* (a) Any landlord, except a landlord subject to an order issued pursuant to § 840.8 (c), whose petition for adjustment or other relief has been dismissed or denied in whole or in part by the Area Rent Director, or any landlord subject to an order entered by the Area Rent Director on his own initiative, may file with the Area Rent Director an application for review of such determination by the Regional Housing Expediter for the region in which the defense-rental area office is located: *Provided*, That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the Area Rent Director under § 840.7, may either apply for review of such order as provided in this section, or may appeal any provision of such order as provided in § 840.14 and following of this part. An application for review shall be filed in triplicate upon forms prescribed by the Housing Expediter and pursuant to instructions stated on such forms. Upon the filing of an application for review or appeal with respect to such determination, the Area Rent Director shall forward the record of the proceedings, with respect to which such application for review is filed, to the appropriate Regional Housing Expediter, or, in the case of an appeal, to the Housing Expediter: *Provided, however*, That the Area Rent Director, within fifteen days after the filing of such application for re-

view or appeal, may grant the relief requested therein, in whole or in part, by revoking or modifying his order upon reconsideration, without notice, except where such order has the effect of requiring the landlord to make a refund to the tenant pursuant to the rent regulations and the landlord has obtained a stay of his obligation to refund in accordance with the provisions of this part.

Within ten days after date of issuance of an order upon reconsideration by the Area Rent Director, the landlord shall file in the Area Rent Office a written statement electing either to withdraw or to continue in effect the pending application for review or appeal. If such statement is not filed within the time provided the application for review or appeal shall be dismissed.

(b) Applications for review may be filed within sixty (60) days after the date of issuance of the determination to be reviewed. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing.

(c) Where the effect of an Area Rent Director's order is to require a landlord to make a refund to the tenant in accordance with the provisions of section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Con-

trolled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), (5) (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the obligation to refund shall be stayed if the landlord, within thirty (30) days after the date of issuance of said order, duly files an application for review together with a refund transmittal memorandum directed to the Regional Budget and Finance Officer on forms prescribed by the Housing Expediter, accompanied by a certified check or money order in the amount of the refund payable to the U. S. Treasurer, and such additional information and documents as may be required. The money so deposited shall be distributed pursuant to the order of the Regional Housing Expediter or in accordance with the final disposition of the proceedings.

§ 840.12 *Action on applications for review.* Upon the filing of an application for review in accordance with § 840.11 and after due consideration the Regional Housing Expediter may, by appropriate order, affirm, revoke, or modify, in whole or in part, the determination of the Area Rent Director sought to be reviewed, or, if considered necessary or appropriate, may remand the proceedings to the Area Rent Director for further action not inconsistent with the determination of the Regional Housing Expediter. In any case where an application for review does not conform in a substantial respect to the requirements of this part, the Regional Housing Expediter may dismiss such application. An order entered by a Regional Housing Expediter upon an application for review shall be effective and binding until changed by further order and shall be final subject only to appeal as provided in § 840.14 and following of this part. An order entered by a Regional Housing Expediter

upon an application for review may be revoked or modified at any time, *Provided, however*, Due notice of the intention so to revoke or modify was previously given to the applicant.

If the effect of the order of the Area Rent Director is to require a refund of rent to the tenant under section 4 (c), 4 (e), 5 (b) (2) or 5 (c) (1) of the Controlled Housing Rent Regulation, section 5 (b) (2) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for New York City Defense-Rental Area, section 5 (b) of the Rent Regulation for Controlled Rooms in Rooming Houses and Other Establishments in New York City Defense-Rental Area, section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Miami Defense-Rental Area, section 5 (b) (2) of the rent regulation for Controlled Rooms in Rooming Houses and Other Establishments in Miami Defense-Rental Area, or section 4 (c), 4 (e), 5 (b) (2), or 5 (c) (1) of the Controlled Housing Rent Regulation for Atlantic County Defense-Rental Area, the modification or revocation of said order by the Regional Housing Expediter or by the Area Rent Director upon remand, as it affects the refund, shall be retroactive if a stay has been obtained pursuant to § 840.11.

§ 840.13 *Receipt of oral testimony.* (a) In most cases, evidence in application for review proceedings will be received only in written form. This procedure is most conducive to the fair and expeditious disposition of such proceedings. However, the person filing an application for review may request the receipt of oral testimony. Such request shall be accompanied by a showing as to why the filing of affidavits or other written evidence will not permit the fair and expeditious disposition of the application.

(b) In the event that the Regional Housing Expediter orders the receipt of oral testimony, notice shall be served on the person filing the application, not less than five (5) days prior to the receipt of such testimony, which notice shall state the time and place of the hearing and the name of the presiding officer designated by the Regional Housing Expediter.

(c) A stenographic report of any hearing of oral testimony shall be made, a copy of which shall be available during business hours in the appropriate Regional or Area Office.

SUBPART B—APPEALS TO THE HOUSING EXPEDITER

Introduction. Subpart B deals with “appeals” to the Housing Expediter. An appeal is the means provided for landlords to make formal objections to a maximum rent regulation or order.

The filing and determination of a proper appeal is ordinarily a prerequisite to obtaining judicial review of administrative determinations. At any time during the administrative consideration of an appeal directed solely to a regulation, the Housing Expediter may refer the appeal to the Area Rent Director for the area from which the appeal arises and request such Area Rent Director to make recommendation with respect to the disposition of the appeal.

General provisions

§ 840.14. *Right to Appeal.* (a) Any landlord subject to any provision of a maximum rent regulation, or of an order issued by a Regional Housing Expediter under § 840.12 (except an order remanding to the Area Rent Director), or of an order entered by an Area Rent Director under section 5 (d) of any maximum rent regulation, or of an order entered by an

Area Rent Director under §§ 840.7 or 840.8 (c), may file an appeal in the manner set forth below.

(b) A landlord is subject to a provision of a maximum rent regulation or of an order only if such provision prohibits or requires action by him.

(c) Any appeal filed by a landlord not subject to the provision appealed from, or otherwise not in accordance with the requirements of this part, may be dismissed by the Housing Expediter.

PART 825—RENT REGULATIONS UNDER THE HOUSING AND RENT ACT OF 1947, AS AMENDED

DECONTROL OF CERTAIN CLASSES OF HOUSING ACCOMMODATIONS

Sec. 1 (b) (2)—Interpretation 2—Aug. 25, 1948

II. *Motor courts*—1. *Provision of regulations.* Section 1 (b) (2) of the Regulations provides for decontrol of housing accommodations in establishments which were motor courts on June 30, 1947. A decontrol provision on motor courts has been included in the regulations since July 1, 1947, based upon section 202 (c) (2) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Test date for decontrol; June 30, 1947.* The test date for decontrol of housing accommodations in motor courts is and has been June 30, 1947. If on June 30, 1947, an establishment was a motor court, all the accommodations in the establishment are decontrolled, and this decontrol continues regardless of any change in facts or rental practices since June 30, 1947. Likewise, if on June 30, 1947, an establishment failed to meet the definition of a motor court, then the housing accommodations in that establishment are

not decontrolled under the "motor court" decontrol provision and no subsequent change in facts or rental practices would cause them to become decontrolled by virtue of that provision.

3. *Partial decontrol.* There is no partial decontrol in the case of motor courts. If an establishment was a motor court on June 30, 1947, all the housing accommodations in that establishment are decontrolled, including trailers and trailer spaces which were attached to and operated as part of the motor court.

CONTROLLED HOUSING RENT REGULATION

§ 825.10. *Controlled Housing Rent Regulation.* The Controlled Housing Rent Regulation, issued pursuant to the Housing and Rent Act of 1947, Public Law 129, 80th Congress, is as follows:

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following:

* * * *

(7) *Accommodations in hotels, motor courts and tourist homes.* (i) Housing accommodations in any establishment which is commonly known as a hotel (See definition of hotel in section 1) in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; (ii) housing accommodations in motor courts; and (iii) housing accommodations in any tourist home serving transient guests, exclusively: *Provided, however,* That all such housing accommodations referred to in this paragraph shall be subject to this regulation unless the landlord files in the area rent office an appli-

cation for decontrol of such accommodations on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after such date of first renting, whichever is the later: and *Provided, further*, That if a landlord fails to file said application for decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said application.

SECTION 825.1

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(2) *Decontrolled housing to which this regulation does not apply.* This regulation does not apply to the following:

(i) *Accommodations in hotels, motor courts, trailers and trailer spaces, and tourist homes.* (a) Housing accommodations in a hotel (see definition of hotel in section 1) which on June 30, 1947, were occupied by persons to whom were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy services (not necessarily all the types of services named need be provided in all cases, as long as enough are provided to constitute customary hotel services usually supplied in establishments commonly known as hotels in the community where they are located); (b) housing accommodations in establishments which were motor courts on June 30, 1947; (c) housing accommodations located in trailers and ground space rented for trailers; and (d) housing accommodations in any tourist home serving transient guests exclusively on June 30, 1947.

§ 840.2 *Landlord's Right to File Petition.* A petition for adjustment or other relief may be filed by any landlord subject to any provision of a maximum rent regulation who requests such adjustment or relief pursuant to a provision of the maximum rent regulation authorizing such action.

§ 840.34 *Treatment of Appeal as Request for Other Relief.* Any appeal filed from a provision of a maximum rent regulation may, in the discretion of the Housing Expediter, be treated not only as an appeal but also as a request for other relief pursuant to the regulation appealed from, when the facts produced in connection with the appeal justify such treatment.

No. 12105

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
VS.

APEX FISH COMPANY, a corporation,
Appellee.

Apostles on Appeal

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED
MAR 4 - 1949

PAUL P. O'BRIEN,
CLERK

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Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

Proctors for Appellant:

MR. J. CHARLES DENNIS,
United States Attorney,
1017 U. S. Court House,
Seattle 4, Washington.

MR. CLAUDE E. WAKEFIELD of
MESSRS. BOGLE, BOGLE & GATES,
Central Building,
Seattle 4, Washington.

Proctors for Appellee:

EDWARD M. HAY and
DAVID O. HAMLIN,
564 Colman Building,
Seattle 4, Washington. [1]

In the District Court of the United States for the
Western District of Washington, Northern Division

In Admiralty No. 15091

APEX FISH COMPANY, a Corporation,
Libelant,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

LIBEL

To the Honorable Judges of the Above-Entitled
Court:

The libel of the above-named libelant against the
United States of America in a cause of cargo loss
and damage, civil and maritime, alleges as follows:

I.

That at all times hereinafter mentioned Apex
Fish Company was and now is a corporation organized
and existing under and by virtue of the laws of the
state of Washington having its principal office and
place of business at Seattle, King County, Washington,
within the above judicial district and has paid all
license fees.

II.

That Lee H. Wakefield and Laverne E. Wakefield
are residents of Seattle, King County, Washington,
and at all times since January 13, 1947, have been
and now are the duly designated, elected and qualified
trustees of said corporation and of all

of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the respondent, the United States of America, was and still is a sovereign power which has by law consented to be sued herein. [2]

IV.

That at all times herein mentioned the respondent, the United States of America, was and now is the owner and operator of the steamship Denali and was the carrier of the cargo hereinafter mentioned.

V.

That at all times hereinafter mentioned said vessel was either a public vessel of the United States of America or employed by the respondent as a merchant vessel and in either event was operated by or on behalf of the respondent as a common carrier of merchandise for hire.

VI.

That if said vessel were privately owned or possessed, a proceeding in admiralty in rem and in personam could now be maintained against said vessel and against her owner by libelant for the loss and damage hereinafter alleged and libelant hereby elects to proceed upon the principles of both a libel in personam and a libel in rem.

VII.

That the steamship Denali will at the time of the filing of this libel be within this district and within the jurisdiction of this Honorable Court.

VIII.

That on August 23, 1946, the said libelant delivered to the respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1,129 half barrels of medium salt herring to be carried from said port of shipment to the port of Seattle, Washington, and there to be delivered in like good order and [3] condition as when shipped to the order of James Farrell and Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the warship short lading Form, then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent.

IX.

That thereafter respondent loaded all the aforesaid merchandise aboard the steamship Denali and the vessel having on board said merchandise, sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, still having the said merchandise aboard, but not in like good order and condition as when delivered to respondent, but completely damaged, destroyed and rendered wholly unfit for any use whatsoever.

X.

That at all times herein mentioned libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That by reason of respondent's failure to deliver said merchandise in good order and condition as received, libelant has been damaged in the sum of \$19,321.89, being the reasonable value of said merchandise at the time of delivery to respondent and at the time of respondent's said failure to deliver in good order and condition.

XII.

That the libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done or performed. [4]

XIII.

That this suit is brought under the Act of March 9, 1920, known as the Suits in Admiralty Act and also chapter 95, 41 Statutes at Large 525, 46 U.S.C., Sections 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 5, 1925, chapter 428, 43 Statutes at Large 1112, 46 U.S.C., Sections 781 to 790, inclusive.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore libelant prays that upon service of a copy of this libel upon the United States Attorney for the Western District of Washington, Northern Division, and upon the mailing of a copy thereof by registered mail to the Attorney General of the United States and the filing of a sworn return of

such service and mailing in accordance with title 46, United States Code, Section 742, respondent be ordered to appear and answer upon oath all and singular are matters aforesaid and that this Honorable Court will be pleased to decree payment from the respondent to the libelant of the damages aforesaid with interest and costs and that libelant have such other, further or different relief as to the court may seem meet, proper and just in the premises and as in law and justice it may be entitled to receive.

s/ EDWARD M. HAY and

/s/ DAVID O. HAMLIN,

Proctors for Libelant. [5]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed July 29, 1947. [6]

[Title of District Court and Cause.]

ANSWER TO LIBEL AND
INTERROGATORIES

To the Honorable Judges of the Above-Entitled Court:

The Answer of the respondent, The United States of America, to the Libel herein admits, denies and alleges as follows:

I.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph I and therefore denies the same.

II.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph II and therefore denies the same.

III.

Respondent admits the allegations of Paragraph III.

IV.

Respondent admits the allegations of Paragraph IV.

V.

Respondent admits the allegations of Paragraph V.

VI.

Respondent denies the allegations of Paragraph VI.

VII.

Respondent denies the allegations of Paragraph VII. [7]

VIII.

Respondent admits that on or about August 23, 1946, the cargo alleged in Paragraph VIII of the Libel, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring was loaded on board the SS "Denali" for carriage to Seattle, Washington, pursuant to the valid terms of bill of lading issued by the Respondent and Respondent denies each and every other allegation contained in said Paragraph VII and particularly denies that said

cargo, at the time of delivery to and loading upon the said vessel, was in good order and condition.

IX.

Respondent admits that said cargo as loaded on board the SS "Denali" arrived at the Port of Seattle and was delivered to the libelant and/or consignee but denies that the same or any part thereof was not in like good order and condition as when delivered to Respondent and denies that the same was completely damaged or destroyed in any respect whatsoever as a result of the carriage of said cargo or any fault or liability of the Respondent or the said vessel, its officers or crew, or at all.

X.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph X and therefore denies the same.

XI.

Respondent denies that libelant has been damaged in the sum of \$19,321.89 or any other sum whatsoever and denies that it failed to deliver said cargo in as good order and condition as when received by the Respondent and the vessel. [8]

XII.

Respondent denies the allegations of Paragraph XII.

XIII.

Respondent admits the allegations of Paragraph XIII.

XIV.

Respondent admits the admiralty jurisdiction but denies that the premises are true.

Further Answering and by Way of First Affirmative Defense, Respondent Alleges:

I.

That the shipment of cargo referred to in the Libel was carried by the Respondent, United States of America, pursuant to the valid terms and conditions of a bill of lading issued by the Respondent and delivered to the Libelant, which said bill of lading was on the regular form of Warship-lading, 7142 for July 1, 1942 (Sec. 303.11, Title 46, CFR, Cum. Supp. 11,336) of the United States War Shipping Administration and incorporated therein the provisions of the Carriage of Goods By Sea Act (46 U.S.C.A. 1300 et seq.) which said bill of lading and the said statutes governed the undertaking of the parties hereto with respect to the carriage of all of said cargo; that the Libelant is now and at all times material herein has been in possession of the originals or exact copies of said bill of lading governing the shipment herein described.

II.

That the said bill of lading issued for the shipment referred to in the Libel contained among others the following provision: [9]

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed

to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or ammunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods or loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *''

III.

That due diligence was exercised to make said vessel seaworthy and properly manned, equipped and supplied at the beginning of the voyage; that any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was the result of inherent defect, quality or vice of the goods as shipped aboard the vessel, one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods by Sea Act hereinabove referred to and that if any of said damage was the result of negligence of the officers or crew or other agents of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the vessel are excused from lia-

bility pursuant to the applicable provisions of the said Carriage of Goods by Sea Act.

Further Answering and by Way of Second Affirmative Defense, Respondent Alleges: [10]

I.

Respondent re-alleges Paragraphs I and II of the First Affirmative Defense and by this reference incorporates the same fully herein.

II.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was solely the result of one of the causes excepted to in the bill of lading hereinabove referred to excepted to in the Carriage of Goods By Sea Act hereinabove referred to, to-wit, was the result of a strike and stoppage of work by the Maritime Unions at the Port of Seattle and other ports on Puget Sound, which said strike prevented the unloading of the said vessel and of libellant's cargo from said vessel until on and after September 25, 1946, for which delay the Respondent is not liable and that if any of said damage was the result of any negligence of any officers or crew or other agents of the Respondent or of the vessel such negligence consisted in faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that Respondent have and recover costs and for such other and further relief as to the court may seem just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America. [11]

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 28, 1947. [12]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED BY
RESPONDENT TO THE LIBELANT

Comes now the Respondent and herewith propounds to the Libelant the following Interrogatories to be answered in writing and under oath as required by the rules and practice of this court, to-wit:

Interrogatory No. 1: Please state categorically the dates upon which the various barrels of herring referred to in the Libel were packed and processed and ready for shipment and the number of barrels so processed on each date.

Interrogatory No. 2: With reference to Interrogatory No. 1, state the dates the fish which went

into said barrels was delivered to the cannery at Port Wakefield.

Interrogatory No. 3: Describe in detail the process of preparing and packing the barrels of salt herring.

Interrogatory No. 4: State what records are kept showing receipt of fish at the cannery and the processing of such fish by the cannery into the completed barrel ready for shipment.

Interrogatory No. 5: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment state where they were kept or store and under what conditions until the time they were shipped on the "Denali." [13]

Interrogatory No. 6: If the barrels were kept or stored on the open dock before loading state how many were so stored and for how long they were so stored and whether they were covered with tarpaulins or otherwise covered or protected.

Interrogatory No. 7: If barrels were kept or stored in a warehouse or covered space before loading state how many were so stored and for how long and what care or protection was afforded the barrels during that time.

Interrogatory No. 8: State the maximum covered storage facilities at the cannery at Port Wakefield and whether said storage facilities were completely filled at the time the "Denali" loaded there on August 23, 1946.

Interrogatory No. 9: When was the peak of the season in 1946 with reference to receipt of the largest quantity of fish at the cannery?

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Interrogatory No. 11: At what temperature should barrels of salt herring be kept when stored to remain in sound and undamaged condition.

Interrogatory No. 12: For how long would a barrel of salt herring have to be subjected to the temperature mentioned in Interrogatory No. 11 to become damaged.

Interrogatory No. 13: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions.

Interrogatory No. 14: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool room stowage [14] or is it desirable or requested?

Interrogatory No. 15: Is salt herring shipped from Seattle to New York or other East Coast cities and if so how is it shipped (by rail or boat) and is it afforded refrigeration during such shipment?

Interrogatory No. 16: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage.

Interrogatory No. 17: State the maximum daily temperatures at Port Wakefield, Alaska, between August 1, 1946, and August 24, 1946, and state whether on each day it was clear, cloudy or rainy.

Interrogatory No. 18: States the invoice value per barrel at Port Wakefield on August 23, 1946, of the following: 1 quarter barrels salt herring, medium; 1 half barrel salt herring, large; and 1 half barrel salt herring, medium;

Interrogatory No. 19: Give the same information as in the foregoing Interrogatory with respect to the landed value of such barrels at Seattle, Washington, in September, 1946.

Interrogatory No. 20: For what price and on what terms were barrels of such salt herring sold in Seattle during September, 1946?

Interrogatory No. 21: Please set forth a computation in detail of the damages to the shipment in question which is alleged in the Libel to be \$19,321.89.

/s/ J. CHARLES DENNIS,

United States Attorney, Proctor for Respondent,
United States of America. [15]

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 28, 1947. [16]

[Title of District Court and Cause.]

ORDER ON LIBELANT'S EXCEPTIONS TO
RESPONDENT'S INTERROGATORIES

The above-entitled cause having come on regularly for hearing before the undersigned Judge of said Court on January 12, 1948, on the libelant's exceptions to respondent's interrogatories, libelant appearing by its proctor, David O. Hamlin, respondent appearing by its proctor, Claude Wakefield, the libelant having moved the court for an order sustaining its exceptions, the court having heard the argument of proctors for the respective parties, having considered the records and files herein, the authorities submitted by the parties, and having heretofore orally announced its decision and being now fully advised, it is by the court

Ordered that libelant's exceptions to respondent's interrogatories numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 14, and 21 be and the same are hereby overruled; and it is further

Ordered that libelant's exceptions to interrogatories numbered 10, 11, 12, 15, 16, 17, 18, 19 and 20 be and the same are hereby sustained.

Done in Open Court this 19th day of January, 1948.

JOHN C. BOWEN,
District Judge.

[Endorsed]: Filed Jan. 19, 1948. [17]

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
INTERROGATORIES

Comes Now the libelant and answers the interrogatories of the respondent as required by the rules and practice of this court, save and except those to which exceptions have heretofore been sustained by said court.

Interrogatory No. 1: Please state categorically the dates upon which the various barrels of herring referred to in the Libel were packed and processed and ready for shipment and the number of barrels so processed on each date.

Answer: Packing of the various barrels of herring referred to in the Libel was commenced on the following dates, the number of half barrels commenced on each day being as indicated:

Date	No. of Half Barrels
July 24, 1946.....	225
July 25, 1946.....	102
July 26, 1946.....	100
July 27, 1946.....	74
July 31, 1946.....	78
August 1, 1946.....	24
August 3, 1946.....	252
August 4, 1946.....	29
August 5, 1946.....	23
August 6, 1946.....	155
August 7, 1946.....	125
August 8, 1946.....	43

Date	No. of Half Barrels
August 9, 1946.....	278
August 10, 1946.....	53
	<hr/>
	1,561

In general processing of each lot so started was completed and the herring ready for shipment ten days after the date of commencement. Attention is directed to the shrinkage factor noted in libellant's answer to interrogatory No. 3 for explanation of the difference between the total number of half barrels packed and the number shipped.

Interrogatory No. 2: With reference to Interrogatory No. 1, state the dates the fish which went into said barrels was delivered to the cannery at Port Wakefield.

Answer: The fish referred to in interrogatory No. 1 went into said barrels on the same day they were delivered to the cannery at Port Wakefield by the fishermen.

Interrogatory No. 3: Describe in detail the process of preparing and packing the barrels of salt herring.

Answer: The fish pass directly from the boat through a sorting device to a work table where they are gibbed, an operation consisting of removal of the pectoral fins, gills and entrails. The gibber grades the fish as to size after which they are salted. The fish are then packed in layers in a half barrel receiving more salt in this operation. When the half barrel is completely full it is headed, placed on

its side and a bung-hole drilled half way between the top and the bottom. Approximately a half gallon of brine is poured into the barrel through this opening, a bung inserted and the barrel stored in the plant for eight or ten days to cure. After curing the barrels are opened and the herring "re-packed." This operation is required because the fish shrink roughly twenty per cent in bulk during the process of curing. The fish are removed from sufficient of the [19] curing barrels and distributed as required to completely fill the remainder. The barrels are again headed, completing the processing.

Interrogatory No. 4: State what records are kept showing receipt of fish at the cannery and the processing of such fish by the cannery into the completed barrel ready for shipment.

Answer: Records are kept each day of each boat delivering fish to the cannery, the amount delivered and the area from which the fish were taken. Records are likewise kept as to the number of barrels processed each day and the date of the original pack is marked on the bottom of the barrel.

Interrogatory No. 5: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment state where they were kept or stored and under what conditions until the time they were shipped on the "Denali."

Answer: After the barrels of salt herring referred to in Interrogatory No. 1 had been processed and completed for shipment they were kept under cover inside libelant's plant at Port Wakefield until two or three days before the arrival of the SS "Denali" on October 23, 1946. The

dock at Port Wakefield will hold approximately 400 barrels and this number or less were moved on to the dock at the time indicated in order to facilitate the speedy departure of the ship. The remainder of the shipment stayed in the plant under cover.

Conditions in the plant are generally wet and cool due to the use of a great deal of water in processing. (20) The average temperature is probably about 50 degrees and has never in libelant's experience been what would be considered hot. Those barrels which were placed on the dock were immediately covered with tarpaulins and empty salt sacks. This covering was kept wet at all times until just before the arrival of the "Denali" when the covering was removed to prepare for loading.

Interrogatory No. 6: If the barrels were kept or stored on the open dock before loading state how many were so stored and for how long they were so stored and whether they were covered with tarpaulins or otherwise covered or protected.

Answer: Libelant does not know exactly how many barrels were stored on the open dock before loading. The capacity of the dock as stated is about 400 half barrels and the dock was not completely full. Such half barrels as were placed on the dock were there for not more than three days and were covered with tarpaulins and salt sacks and wet down as above stated.

Interrogatory No. 7: If barrels were kept or stored in a warehouse or covered space before loading state how many were so stored and for how long and what care or protection was afforded the barrels during that time.

Answer: All of the half barrels mentioned in the Libel were stored in libelant's plant under cover until two or three days before the "Denali" arrived on August 23, 1946, at which time something less than 400 of such half barrels were removed to the open dock. Such half barrels were stored for varying lengths of time. In general the number packed on each day as stated in libelant's answer [21] to Interrogatory No. 1 less the twenty per cent shrinkage were placed in said storage approximately ten days after processing was started. No particular care or protection was given or required by these barrels in covered storage as the weather was cool and conditions in all respects normal.

Interrogatory No. 8: State the maximum covered storage facilities at the cannery at Port Wakefield and whether said storage facilities were completely filled at the time the "Denali" loaded there on August 23, 1946.

Answer: Libelant's plant at Port Wakefield will accommodate 3,000 half barrels. The facilities were not filled at the time the "Denali" loaded there on August 23, 1946.

Interrogatory No. 9: When was the peak of the season in 1946 with reference to receipt of the largest quantity of fish at the cannery?

Answer: The peak of the season in 1946 with reference to receipt of the largest quantity of fish at libelant's cannery at Port Wakefield occurred during the month of September.

Interrogatory No. 13: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions.

Answer: Under cool room storage a barrel of salt herring will remain in good condition indefinitely. At ordinary room temperatures of around 70 degrees libelant does not believe it would remain sound for longer than one week. [22]

Interrogatory No. 14: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool room storage or is it desirable or requested?

Answer: The shipment of salt herring from Alaska to Seattle does not require cold storage or cool room storage nor is it desired or requested by libelant. Any ordinary cool hold of the ship not containing steam pipes or bulkheads adjoining the engine room or containing steam pipes has been found satisfactory in libelant's experience.

Interrogatory No. 21: Please set forth a computation in detail of the damages to the shipment in question which is alleged in the Libel to be \$19,321.89.

Answer: A detailed computation of the damages to the shipment in question is as follows:

Value fair average quality salt herring, f.o.b. Seattle:	
110 quarter barrels medium at \$13.00 ea.....	\$ 1,430.00
119 half barrels large at \$23.00 ea.....	2,737.00
1129 half barrels medium at \$21.00 ea.....	23,709.00
<hr/>	
Total.....	\$27,876.00

Less, Proceeds of sales of above salt herring:

596 half barrels medium at \$15.75 ea.....	\$9,387.00
21 half barrels large at \$8.00 ea.....	168.00
79 half barrels medium at \$8.00 ea.....	632.00
22 quarter barrels medium at \$5.00 ea.....	110.00
8 quarter barrels medium at \$4.00 ea.....	32.00

10,329.00

\$17,547.00

Loss on sale of salt herring:

Following lots were adjudged unfit for human consumption and were picked up by a "scrap reduction" company:

- 80 quarter barrels medium
- 98 half barrels large
- 454 half barrels medium

Add, Extra costs of handling because of damage: [23]

Wahl Bros. Inv. No. 1442	
for inspection & culling.....	\$ 99.00
Wahl Bros. Inv. No. 1444	
for inspection & repair.....	67.97
Wahl Bros. Inv. No. 1485	
for inspection	54.00

Port of Seattle Bills:

Bill No. B97647—extra wharfage & handling to cold storage—971 half barrels 9/4/46	153.59
Bill No. B97648—receiving into cold storage 9/4/46	258.72
Bill No. B97649—rolling out for Pete Wahl's inspection from cold storage 9/7/46.....	157.86
Bill No. B97650—handling to cold storage 617 half barrels	250.54
Bill No. B98347—storage on 227 halves & 110 quarters 10/3/46 to 11/2/46.....	15.44
Bill No. B98348—storage on 354 halves from 9/11 to 10/10/46.....	16.06
Bill No. B98397—labor & rental of equipment for Pete Wahl's inspection 11/12/46.....	23.90
Bill No. 56916—cold storage on 617 lbs. 10/7/46 through 11/30/46.....	139.33

II.

That Lee H. Wakefield and Laverne E. Wakefield are residents of Seattle, King County, Washington, and at all times since January 13, 1947, have been and now are the duly designated, elected and qualified trustees of said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the respondent, the United States of America, was and still is a sovereign [26] power which has by law consented to be sued herein.

IV.

That at all times herein mentioned the respondent, the United States of America, was and now is the owner and operator of the steamship Denali and was the carrier of the cargo hereinafter mentioned.

V.

That at all times hereinafter mentioned said vessel was either a public vessel of the United States of America or employed by the respondent as a merchant vessel and in either event was operated by or on behalf of the respondent as a common carrier of merchandise for hire.

VI.

That if said vessel were privately owned or possessed, a proceeding in admiralty in rem and in personam could now be maintained against said vessel and against her owner by libellant for the loss and

damage hereinafter alleged and libelant hereby elects to proceed upon the principles of both a libel in personam and a libel in rem.

VII.

That the steamship Denali was at the time of the filing of the original libel herein within this district and within the jurisdiction of this Honorable Court.

VIII.

That on August 23, 1946, the said libelant delivered to the respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1,129 half barrels of medium salt herring to be carried from said port of shipment to the port of [27] Seattle, Washington, and there to be delivered in like good order and condition as when shipped to the order of James Farrell and Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the Warship short lading Form, then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent.

IX.

That thereafter respondent loaded all the aforesaid merchandise aboard the steamship Denali and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, still having the said merchandise aboard, but not in like good order

and condition as when delivered to respondent, but damaged, destroyed and a portion thereof rendered wholly valueless.

X.

That at all times herein mentioned libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That by reason of respondent's failure to deliver said merchandise in good order and condition as received, libelant has been damaged in the sum of \$19,321.89, being the difference between the reasonable value of said merchandise in the condition in which it was discharged and delivered to respondent and the value such merchandise would have had f.o.b. Seattle had respondent discharged and delivered it to libelant at said port of discharge in like good order and condition as when received by respondent, together with [28] necessary and reasonable charges incurred by libelant in the storage, handling, keeping and disposition of said merchandise.

XII.

That the libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done or performed.

XIII.

That this suit is brought under the Act of March 9, 1920, known as the Suits in Admiralty Act and also chapter 95, 41 Statutes at Large 525, 46 U.S.C.,

Sections 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 5, 1925, chapter 426, 43 Statutes at Large 1112, 46 U.S.C., Sections 781 to 790, inclusive.

XIV.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore libelant prays that upon service of a copy of this libel upon the United States Attorney for the Western District of Washington, Northern Division, and upon the mailing of a copy thereof by registered mail to the Attorney General of the United States and the filing of a sworn return of such service and mailing in accordance with title 46, United States Code, Section 742, respondent be ordered to appear and answer upon oath all and singular the matters aforesaid and that this Honorable Court will be pleased to decree payment from the respondent to the libelant of the damages aforesaid with interest and costs and that libelant have such other, further or different relief as to [29] the court may seem meet, proper and just in the premises and as in law and justice it may be entitled to receive.

/s/ EDWARD M. HAY and

/s/ DAVID O. HAMLIN,

Proctors for Libelant.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1948. [30]

[Title of District Court and Cause.]

ANSWER TO AMENDED LIBEL

To the Honorable Judges of the Above-Entitled Court:

The Answer of the respondent, The United States of America, to the Amended Libel herein admits, denies and alleges as follows:

I.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph I and therefore denies the same.

II.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph II and therefore denies the same.

III.

Respondent admits the allegations of Paragraph III.

IV.

Respondent admits the allegations of Paragraph IV.

V.

Respondent admits the allegations of Paragraph V.

VI.

Respondent denies the allegations of Paragraph VI.

VII.

Respondent denies the allegations of Paragraph VII. [31]

VIII.

Respondent admits that on or about August 23, 1946, the cargo alleged in Paragraph VIII of the Libel, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring was loaded on board the SS "Denali" for carriage to Seattle, Washington, pursuant to the valid terms of bill of lading issued by the Respondent and Respondent denies each and every other allegation contained in said Paragraph VII and particularly denies that said cargo, at the time of delivery to and loading upon the said vessel, was in good order and condition.

IX.

Respondent admits that said cargo as loaded on board the SS "Denali" arrived at the Port of Seattle and was delivered to the libelant and/or consignee but denies that the same or any part thereof was not in like good order and condition as when delivered to Respondent and denies that the same was completely damaged or destroyed in any respect whatsoever as a result of the carriage of said cargo or any fault or liability of the Respondent or the said vessel, its officers or crew, or at all.

X.

Respondent does not have sufficient knowledge or information to form a belief as to the matters alleged in Paragraph X and therefore denies the same.

XI.

Respondent denies that libelant has been damaged in the sum of \$19,321.89 or any other sum whatso-

ever and denies that it failed to deliver said cargo in as good order and condition as when received by the Respondent and the vessel, and denies that Respondent is liable in any event for the f.o.b. Seattle value or [32] for any charges for storage, handling or otherwise, and denies that such charges were necessarily incurred.

XII.

Respondent denies the allegations of Paragraph XII.

XIII.

Respondent admits the allegations of Paragraph XIII.

XIV.

Respondent admits the admiralty jurisdiction but denies that the premises are true.

Further Answering and by Way of First Affirmative Defense, Respondent Alleges:

I.

That the shipment of cargo referred to in the Libel was carried by the Respondent, United States of America, pursuant to the valid terms and conditions of a bill of lading issued by the Respondent and delivered to the Libelant, which said bill of lading was on the regular form of Warship lading, 7142 for July 1, 1942, (Sec. 303.11, Title 46, CFR, Cum. Supp. 11,336) of the United States War Shipping Administration and incorporated therein the provisions of the Carriage of Goods By Sea Act (46 U.S.C.A. 1300 et seq.) which said bill of lading and the said statutes governed the under-

taking of the parties hereto with respect to the carriage of all of said cargo; that the Libelant is now and at all times material herein has been in possession of the originals or exact copies of said bill of lading governing the shipment herein described.

II.

That the said bill of lading issued for the shipment referred to in the Libel contained among others the following provision: [33]

“This bill of lading shall have effect subject to the provisions of the Carriage of Goods By Sea Act of the United States of America approved April 16, 1936, which shall be deemed to be incorporated herein and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or ammunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (unless or except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier * * *”

III.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the said vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was the result of inherent

defect, quality or vice of the goods as shipped aboard the vessel, one of the causes excepted in the bill of lading hereinabove referred to and excepted in the Carriage of Goods by Sea Act hereinabove referred to and that if any of said damage was the result of negligence of the officers or crew or other agents of the Respondent or of the vessel such negligence consisted of faults or errors in navigation or in the management of the vessel for which the Respondent and the vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Further Answering and by Way of Second Affirmative Defense, Respondent Alleges:

I.

Respondent re-alleges Paragraphs I, II and III of the First Affirmative Defense and by this reference incorporates the same fully herein.

II.

That any damage sustained by said cargo referred to in the Libel herein while in the custody of the Respondent or of the [34] vessel was not caused or contributed to by any fault or neglect on the part of Respondent or on the part of the vessel, its officers or crew, but was solely the result of one of the causes excepted to in the bill of lading hereinabove referred to excepted to in the Carriage of Goods By Sea Act hereinabove referred to, to-wit, was the result of a strike and stoppage of work by the Maritime Unions at the Port of Seattle and other ports on Puget Sound, which

said strike prevented the unloading of the said vessel and of libelant's cargo from said vessel until on and after September 25, 1946, for which delay the Respondent is not liable and that if any of said damage was the result of any negligence of any officers or crew or other agents of the Respondent or of the vessel such negligence consisted in faults or errors in navigation or in the management of the vessel for which the Respondent and the said vessel are excused from liability pursuant to the applicable provisions of the said Carriage of Goods By Sea Act.

Wherefore, Respondent prays that the Libel herein be dismissed and that Libelant take nothing thereby and that Respondent have and recover costs and for such other and further relief as to the Court may seem just in the premises.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America.

BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel. [35]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 2, 1948. [36]

[Title of District Court and Cause.]

INTERROGATORIES PROPOUNDED
RESPONDENT BY LIBELANT

Comes now the libelant and herewith propounds to the respondent the following interrogatories to

be answered in writing and under oath as required by the rules and practice of this court, to-wit:

Interrogatory No. 1: Please state what was done to make the SS "Denali" seaworthy and properly manned, equipped with supplies at the beginning of the voyage during which libelant's 1,358 barrels of herring mentioned in the amended libel were carried from Port Wakefield, Alaska, to Seattle, Washington.

Interrogatory No. 2: State what records, if any, were kept by respondent or any agent or agency thereof with reference to stowage of the cargo of 1,358 barrels of herring mentioned in the amended libel aboard the SS "Denali."

Interrogatory No. 3: Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed, giving the number of barrels stowed in each place, if more than one, and the exact location in the hold. [37]

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" in each portion of the ship where said cargo was so carried or kept.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the salt herring mentioned in the amended libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes,

shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Interrogatory No. 8: State whether there were any steampipes within the hold or holds where the cargo of salt herring mentioned in the amended libel was carried or in the bulkheads thereof; and if so, state the portions of the voyage during which they were charged with steam, the temperature thereof and the proximity of such steampipes to the cargo of salt herring. [38]

Interrogatory No. 9: State what inherent defect, quality or vice existed in the cargo of herring mentioned in the amended libel at the time said goods were shipped aboard the Denali.

Interrogatory No. 10: State whether respondent has in its possession, custody or control any plan, diagram, drawing, photograph, or object of a similar nature showing the structural disposition of the hold or other portions of the Denali where the cargo of salt herring mentioned in the amended

libel was kept or carried, or the location of bulkheads, shaft alleys, steampipes or other sources of heat with reference to the place or places said cargo was stowed as they existed during the time such cargo was so kept or carried.

Interrogatory No. 11: If respondent's answer to Interrogatory No. 10 was in the negative, state whether or not, if within respondent's knowledge any such diagram, drawing, photograph or object of a similar nature exists and the whereabouts thereof.

Interrogatory No. 12: Please state the names and last known residence and/or mailing addresses of all persons superintending or having knowledge of the stowage of the cargo of salt herring mentioned in the amended libel aboard the Denali on the voyage from Port Wakefield, Alaska to Seattle, Washington.

Interrogatory No. 13: Please state whether or not any portion or portions of the cargo of salt herring mentioned in the amended libel was overstowed with any other cargo or material; and if so, give a description of the type of such cargo or material and the amount thereof. [39]

Interrogatory No. 14: Please state the acts constituting negligence of the officers or crew or other agents of the respondent or of the vessel, which negligence is alleged to consist of faults or errors in navigation or in the management of the vessel, and for which the respondent and the vessel are alleged in paragraph III of Respondent's First Affirmative Defense to be excused from liability

pursuant to the applicable provisions of the Carriage of Goods by Sea Act.

Interrogatory No. 15: Please state how many of the barrels of salt herring mentioned in the amended libel were discharged from the Denali prior to the strike and stoppage of work by the Maritime Unions at the Port of Seattle alleged in paragraph II of Respondent's Second Affirmative defense.

Interrogatory No. 16: Please state whether any of the barrels of salt herring mentioned in the amended libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

Interrogatory No. 17: State the day and the hour when the Denali was required to suspend discharging her cargo as a result of the strike and stoppage of work mentioned in Respondent's Second Affirmative defense.

Interrogatory No. 18: State the time of the day on September 25, 1946, when the strike and stoppage of work alleged in the Second Affirmative defense ended.

Interrogatory No. 19: When were the remainder of the barrels of salt herring mentioned in the amended libel discharged from the Denali after termination of such strike and stoppage of work on September 25, 1946? [40]

Interrogatory No. 20: State whether any survey or inspection was made of the barrels of salt herring mentioned in the amended libel at or after the time of discharge from the Denali at Seattle

by any employee, officer, or agent of respondent; whether or not such survey or inspection was made alone or jointly with any other person: the dates of such surveys or inspections, if more than one, and the name or names of the persons making the same.

Interrogatory No. 21: If a survey or inspection was made as stated in Interrogatory No. 20, state whether the salt herring mentioned in the libel was found to be in a damaged condition, and the apparent cause thereof, such as freezing, exposure to heat, contamination, or other cause.

Interrogatory No. 22: State whether any inspection or survey was made of the salt herring mentioned in the amended libel by respondent or anyone on its behalf at or about the time such salt herring was delivered to the Denali at Port Wakefield, Alaska.

Interrogatory No. 23: In respondent's answer to Interrogatory No. 22 was "yes," state the nature and extent of such inspection and what such inspection revealed as to the condition of such salt herring.

/s/ EDWARD M. HAY,

and

/s/ DAVID O. HAMLIN,

Proctors for Libelant, Apex Fish Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 28, 1948. [41]

[Title of District Court and Cause.]

ORDER ON RESPONDENT'S EXCEPTIONS
TO LIBELANT'S INTERROGATORIES

The above-entitled cause having come on regularly for hearing before the undersigned Judge of said Court on April 5, 1948, on respondent's exceptions to libelant's interrogatories, libelant appearing by its proctor David O. Hamlin, respondent appearing by its proctor Claude Wakefield, the libelant having moved the court for an order overruling said exceptions, the Court having heard the argument of proctors for the respective parties, having considered the records and files herein, the authorities submitted by the parties and having heretofore orally announced its decision and being now fully advised, it is by the Court

Ordered that respondent's exception to libelant's interrogatory No. 1 be and the same is hereby sustained; and it is further

Ordered that respondent's exceptions to libelant's interrogatories No. 4, 5, 6, 7, 8, 10, 11, 12, 14 and 21 be and the same are hereby overruled; provided, however, that respondent shall not be required to make or prepare any drawing or diagram requested in said interrogatories which is not already in existence; and it is further

Ordered that the Court does hereby reconsider its ruling heretofore made on libelant's exceptions to respondent's [42] interrogatories as contained in order entered herein January 19, 1948, and the same is modified in that libelant's exceptions to respondent's interrogatories numbered 10, 11, 12,

15, 16 and 17 be and the same are hereby over-ruled.

Done in open Court this 10th day of April, 1948.

JOHN C. BOWEN,
District Judge.

Presented by:

DAVID O. HAMLIN,
Of Proctors for Libellant.

Approved as to form and Notice of Presentation
Waived:

/s/ CLAUDE E. WAKEFIELD,
Of Proctors for Respondents.

[Endorsed]: Filed April 10, 1948. [43]

[Title of District Court and Cause.]

LIBELANT'S REQUEST FOR ADMISSIONS
UNDER ADMIRALTY RULE 32B

The libellant requests the respondent to admit the truth of the following relevant matters of fact herein set forth for the purpose of the pending action only:

1. That at all times mentioned in the amended libel herein the libellant Apex Fish Company was and ever since has been a corporation organized and existing under and by virtue of the laws of the State of Washington having its principal office and place of business at Seattle, King County, Washington, within the above judicial district and has paid all license fees.

2. That Lee H. Wakefield and Laverne E. Wakefield are residents of Seattle, King County, Washington, and at all times since January 13, 1947, have been and now are the duly designated, elected and qualified trustees of said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

3. That no license fees are required by the laws of the state of Washington of a corporation which has entered upon voluntary dissolution as a prerequisite to doing business or maintaining an action in the above entitled court including this action. [44]

4. That at the time of the filing and service of the original libel herein the SS "Denali" was within the above-entitled district and within the jurisdiction of this honorable court.

5. That at all times mentioned in the amended libel herein libelant was the sole owner of the merchandise for which recovery is sought herein.

6. That the reasonable market value f.o.b. Seattle, Washington, of salt herring of the grade and quality of that in suit herein, if undamaged, at the time of delivery by respondent to libelant at Seattle, Washington, was as follows:

Quarter barrels medium,	\$13.00 each
Half barrels large,	23.00 each
Half barrels medium,	21.00 each

7. That Exhibit "A" hereto attached is a true copy of the Bill of Lading signed and delivered to libelant by a duly authorized agent or representative of the respondent at Port Wakefield, Alaska, on August 23, 1946, covering the shipment for which recovery is sought herein.

8. That the libelant has fully performed all of the terms and conditions of said Bill of Lading and of the contract of carriage alleged in the amended libel by libelant to be done or performed including full payment of the agreed freight to respondent.

9. That upon discharge of the merchandise referred to in the amended libel from the Denali at Seattle, Washington, the following portion of such shipment was unfit for human consumption and had no salvage value whatsoever:

80 quarter barrels medium salt herring.

98 half barrels large salt herring.

454 half barrels medium salt herrin. [45]

10. That the balance of said shipment referred to in the amended libel herein, at the time of its discharge from the Denali at Seattle, Washington, after deduction of the 632 barrels mentioned in request number nine, had no salvage or other value whatsoever, save and except the following:

596 half barrels medium at \$15.75 ea.	\$9,387.00
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21 half barrels large at \$8.00 each	168.00
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79 half barrels medium at \$8.00 each	632.00
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22 quarter barrels medium at \$5.00 ea.	110.00
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8 quarter barrels medium at \$4.00 ea.	32.00
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Total salvage.....	\$10,329.00
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11. That the following expenditures were reasonable in amount and were necessarily incurred by libelant in care, preservation and sale of the salt herring mentioned in the amended libel herein:

Wahl Bros. Inv. No. 1442 for inspection & culling.....	99.00
Wahl Bros. Inv. No. 1444 for inspection & repair	67.97
Wahl Bros. Inv. No. 1485 for inspection..	54.00
Port of Seattle Bills:	
Bill No. B97647—extra wharfage & han- dling to cold storage—971 half barrels 9/4/46	153.59
Bill No. B97648—receiving into cold stor- age 9/4/46.....	258.72
Bill No. B97649 —rolling out for Pete Wahl's inspection from cold storage 9/7/46	157.86
Bill No. B97650—handling to cold storage 617 half barrels.....	250.54
Bill No. B98347—storage on 277 halves & 110 quarters 10/3/46 to 11/2/46.....	15.44
Bill No. B98348 —storage on 354 halves from 9/11 to 10/10/46.....	16.06
Bill No. B98397—labor & rental of equip- ment for Pete Wahl's inspection 11/12/46	23.90
Bill No. 56916—cold storage on 617 bbls. 10/7/46 through 11/30/46.....	139.33

Bill No. 57243 — wharf storage on 354 halves 10/11 through 12/31/46 and on 387 halves 11/3/46 through 11/30/46 and on 278 halves 12/1/46 through 12/31/46	68.48
L. C. Perry, Marine Surveyor.....	450.00
Laucks Laboratories, Inc.....	10.00
No. 96267	
No. 96557	10.00
<hr/>	
Total.....	\$1,774.89

12. That the absence of any value whatsoever as to the 80 quarter barrels medium, 98 half barrels large, 454 half barrels medium mentioned in request number nine herein; the difference between the market value set forth in request number six herein and the salvage value of the 726 barrels set forth in request number ten herein; and the incurring of the expense set forth in request number nine herein were each and all the direct and proximate result of the damaged and deteriorated condition of the said cargo of herring mentioned in the amended libel herein at the time and place of discharge and delivery to libellant at Seattle, Washington.

Libellant hereby designates the period within which respondent may serve upon libellant a sworn statement either denying specifically the matters of which an admission is requested or setting forth

in detail the reasons why respondent cannot truthfully either admit or deny those matters to be the ten days next elapsing after service of this request

/s/ EDWARD M. HAY,

and

/s/ DAVID O. HAMLIN,

Proctors for Libelant.

(Acknowledgment of Service.)

[Endorsed]: Filed April 8, 1948. [47]

MASTER'S AGENT

(SHORT FORM)

M. 2.

_Voyage No. _____

Pre No.

(If goods to be trans-shipped at Port of Discharge)

(See Clause 11 of Warrickpolding referred to herein)

PARTICULARS FURNISHED BY SHIPPER OF GOODS

12--If the goods herein covered are carried on a vessel owned by or under bareboat charter to the United States and which is a Public Vessel of the United States, administration on behalf of the United States, hereby assumes all liabilities it would have with respect to the carriage of such goods if the vessel were a merchant vessel with respect to cargo owned by the United States or any Agency or Department thereof, and load-loss cargo. This clause is to be construed only as an agreement that goods carried on such a public vessel shall be treated as though the carrying vessel were a merchant vessel with respect to liability for loss or damage to such cargo.

WANNING

PREPAID TO APPLY

IN WITNESS WHEREOF, the Master of the said
has affirmed to this bill of lading.

this 23rd day of August

By-

B/L No.

48 Shoe

[Title of District Court and Cause.]

RESPONDENT'S ANSWERS TO DEMAND
FOR ADMISSIONS
(Admiralty Rule 32B)

Respondent makes the following answer to libelant's request for admissions:

I.

Respondent has no knowledge or information as to the legal corporate status of the libelant and has no means of obtaining the same except through the Office of the Secretary of State of Washington at Olympia and by the purchase of a certificate or certificates of good standing and that said request is improper and not within the provisions of Admiralty Rule 32B and that the same calls for a legal conclusion, wherefore respondent is unable to admit the demand contained in Paragraph I.

II.

Respondent makes the same response to Paragraph II as is set forth above in Paragraph I and additionally respondent states that said demand for admission is improper and irrelevant and calls for the admission of a legal conclusion based upon facts not in respondent's possession nor available to respondent.

III.

Respondent refuses to answer Paragraph III for the reason that the same is improper and irrelevant and calls for a legal conclusion of a matter which is within the province of the Court [49] to determine. Respondent has no knowledge or information of the facts nor can respondent obtain the same.

IV.

The libel was filed July 29, 1947, and respondent is advised that the same was served upon the Attorney General of the United States August 4, 1947. The SS "Denali" sailed from Seattle for Alaska on July 31, 1947, and was not thereafter in Seattle until August 18, 1947.

V.

Respondent has no knowledge or information as to the ownership of the cargo which is the subject matter of the libel nor any means of determining the same. The libel does not allege that libelant was the owner. Ownership is a legal conclusion for the Court to determine. Respondent admits that Apex Fish Company shipped the cargo in question consigned to the order of James Farrell & Co. at Seattle as evidenced by the Bill of Lading and that respondent was obligated to and did deliver said cargo to James Farrell & Co., the only party entitled thereto.

VI.

Respondent has no knowledge or information as to the sound value of barrels of salt herring in Seattle on September 4, 1946, or September 26, 1946, nor has respondent any means of ascertaining such value except by actual sales made by libelant or others and respondent has no means of knowing to whom such herring was sold on September 4, 1946, or on any other date. The libel does not allege such values or any values per barrel of herring. There is no established or public market or quota-

tion known to respondent, wherefore respondent cannot and does not admit the same.

VII.

Respondent admits that Exhibit "A" attached to the demand for admissions in a photostatic copy of the Bill of Lading covering [50] the shipment in question on the Warship Short Lading Form of the United States War Shipping Administration incorporating therein "The Uniform Bill of Lading (Warship Lading 7-1-42) adopted by General Order No. 16 of the Administrator, War Shipping Administration, July 4, 1942, which shall be deemed incorporated herein * * *."

VIII.

Libelant is not obligated to perform any terms and conditions of the Bill of Lading beyond the delivery of the quantity of cargo receipted for and delivery of the same in good order and condition and respondent denies that libelant delivered said cargo to respondent in good order and condition. All other terms and conditions of the Bill of Lading insofar as respondent is concerned are the obligations of the consignee James Farrell & Co. Respondent admits that the agreed freight was paid by James Farrell & Co.

IX.

Neither the libel nor the amended libel alleges the number of barrels claimed to be unfit for human consumption. However, the Survey Report of Alexander Gow, Inc., in the possession of respondent states as follows:

"Shipped Quantity	Fair Quality	Poor Quality	Valueless	Total
1129½ Bbl. Med.	596	79	454	
119½ Bbl. Lge.		21	98	
110¼ Bbl. Med.		30	80	
	<hr/> 596	<hr/> 130	<hr/> 632	<hr/> 1358"

X.

Respondents are advised in the Survey Report of Alexander Gow, Inc., above referred, that the sum of \$10,329 salvage was realized by the owner of the cargo in question by sale to the highest bidder. [51]

XI.

Respondent denies all of the items of expense as being necessarily incurred by libelant and has no knowledge or information as to the extent, nature or reasonableness of the charges, none of which were incurred with the knowledge or consent of the respondent except the sum of \$585.30 approved by respondent's surveyor, Alexander Gow, Inc., without prejudice to liability or responsibility therefor as follows:

"Wahl Bros. Inspection & Segregation	\$99.00
Wahl Bros. Inspection & Segregation	54.00
Removing herring from cold storage to warehouse for inspection & segregation	157.86
Return to cold storage.....	250.54
Labor & equipment for inspection.	23.90

\$585.30"

XII.

Respondent declines to answer Paragraph XII for the reason that it is a duplication of previous requests herein contained and herein answered; that it calls for a conclusion of law; that it calls for the expression of opinion and not of fact and that it is within the province of the Court to determine the conclusions as to the proximate cause of damage and the items legally recoverable if any.

J. CHARLES DENNIS,

United States Attorney, Proctor for Respondent.

BOGLE, BOGLE & GATES

CLAUDE E. WAKEFIELD,

Of Counsel. [52]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 16, 1948. [53]

[Title of District Court and Cause.]

RESPONDENTS ANSWER TO INTERROGATORIES PROPOUNDED BY LIBELANT.

Respondent herewith answers Libelant's interrogatories as follows:

Interrogatory No. 2: State what records, if any, were kept by respondent or any agent or agency thereof with reference to stowage of the cargo of 1,358 barrels of herring mentioned in the amended libel aboard the SS "Denali."

Answer: A stowage plan and hatch list.

Interrogatory No. 3. Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed; giving the number of barrels stowed in each place, if more than one, and the exact location in the hold.

Answer: 971 half barrels in No. 3 lower hold center. 110 quarter barrels and 277 half barrels in No. 4 lower hold center.

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" [54] in each portion of the ship where said cargo was so carried or kept.

Answer: No maximum temperatures were taken. The log book records temperatures irregularly as follows:

August 23, 1946. 11:58 A.M. Arrived Port Wakefield. Temperature 62°.

August 24, 1946. 8:52 A.M. Arrived Port Vita. Temperature 57°.

August 25, 1946. Port Bailey. 19.04. Temperature 54°.

August 26, 1946. 02:26 (A.M.) Left Port Bailey. Temperature 52°.

August 26, 1946. Womans Bay. 12:00 Noon. Temperature 55°.

Similar temperatures were taken at indiscriminate times varying from 50 to 66 degrees upon arrival at Seattle, September 2, 1946, at 15:56 (P.M.) all as set forth in the vessel's log book.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the cargo of salt herring mentioned in the libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes, shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Answer: No such drawing or diagrams are available except the stowage plan which is in Respondent's possession and except a scale drawing of all of the holds which is in Respondent's possession and which is available for photostating by Libellant if desired. No steampipes are shown as there are no steampipes in these holds or in bulkheads.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Answer: No precautions were taken nor are required. The lower holds are not subjected to heat at any time, they are below the water line and remain cool. They have no steampipes and are used frequently to carry perishable cargoes.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Answer: Nothing was done nor required to be done. The herring was not shipped as cold storage

Interrogatory No. 3. Please designate the portion or portions of the Denali in which the cargo of herring mentioned in the amended libel was stowed; giving the number of barrels stowed in each place, if more than one, and the exact location in the hold.

Answer: 971 half barrels in No. 3 lower hold center. 110 quarter barrels and 277 half barrels in No. 4 lower hold center.

Interrogatory No. 4: State the maximum daily temperature on each day of the voyage and after the termination thereof during which the cargo of salt herring mentioned in the amended libel was carried or kept aboard the SS "Denali" [54] in each portion of the ship where said cargo was so carried or kept.

Answer: No maximum temperatures were taken. The log book records temperatures irregularly as follows:

August 23, 1946. 11:58 A.M. Arrived Port Wakefield. Temperature 62°.

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Similar temperatures were taken at indiscriminate times varying from 50 to 66 degrees upon arrival at Seattle, September 2, 1946, at 15:56 (P.M.) all as set forth in the vessel's log book.

Interrogatory No. 5: Please furnish a drawing or diagram of each portion of the Denali where the cargo of salt herring mentioned in the libel was carried or kept, showing the exact location of said cargo, and the exact location of any steampipes, shaft alleys, or other sources of heat, whether open or concealed in bulkheads or otherwise.

Answer: No such drawing or diagrams are available except the stowage plan which is in Respondent's possession and except a scale drawing of all of the holds which is in Respondent's possession and which is available for photostating by Libellant if desired. No steampipes are shown as there are no steampipes in these holds or in bulkheads.

Interrogatory No. 6: State what special precautions, if any, were taken at the beginning of the voyage or thereafter to protect the cargo of salt herring mentioned in the amended libel from heat damage.

Answer: No precautions were taken nor are required. The lower holds are not subjected to heat at any time, they are below the water line and remain cool. They have no steampipes and are used frequently to carry perishable cargoes.

Interrogatory No. 7: State what, if anything, was done at the beginning of the voyage or thereafter to secure those portions of the Denali where the cargo of herring mentioned in the amended libel was kept or carried from heat deemed by respondent to be excessive or dangerous with reference to the type of cargo to be carried.

Answer: Nothing was done nor required to be done. The herring was not shipped as cold storage

nor cool room stowage requested nor contracted for. The lower holds Nos. 3 and 4 are ordinary ships holds below the water line. They are not hot but remain at average outside temperatures.

Interrogatory No. 8: State whether there were any steampipes within the hold or holds where the cargo of salt herring mentioned in the amended libel was carried or in the bulkheads thereof; and if so, state the portions of the voyage during which they were charged with steam, the temperature thereof and the proximity of such steampipes to the cargo of salt herring.

Answer: There are not any steampipes in the holds where the herring was stowed, nor in any bulkheads of said holds. [56]

Interrogatory No. 9: State what inherent defect, quality or vice existed in the cargo of herring mentioned in the amended libel at the time said goods were shipped aboard the Denali.

Answer: The inherent defect quality or vice of the cargo at the time of shipment consisted of:

1. Fish being held too long at the cannery before processing due to congestion or otherwise.

2. Improper curing and preparation of the herring such as insufficient salt or brine.

3. The barrels of herring being held too long at the cannery before shipment (See Answer of libellant to respondent's interrogatory No. 1) and barrels of herring not being properly refrigerated during the time held at the cannery.

4. The barrels of herring being stored in the open dock at the cannery, subjected to the warm sun.

5. Other inherent causes not known to the respondent.

Interrogatory No. 10. State whether respondent has in its possession, custody or control any plant, diagram, drawing, photograph, or object of a similar nature showing the structural disposition of the hold or other portions of the Denali where the cargo of salt herring mentioned in the amended libel was kept or carried, or the location of bulkheads, shaft alleys, steampipes or other sources of heat with reference to the place or places said cargo was stowed as they existed during the time such cargo was so kept or carried.

Answer: See Respondent's answer to Interrogatory No. 5 above, copies of which said stowage plan and scale drawing of the [57] holds are available to Libellant for photostating upon request.

Interrogatory No. 11: If respondent's answer to Interrogatory No. 10 was in the negative, state whether or not, if within respondent's knowledge any such diagram, drawing, photograph or object of a similar nature exists and the whereabouts thereof.

Answer: Respondent believes that the builder's plans may be available if required.

Interrogatory No. 12: Please state the names and last known residence and/or mailing addresses of all persons superintending or having knowledge of the stowage of the cargo of salt herring mentioned in the amended libel aboard the Denali on the voyage from Port Wakefield, Alaska to Seattle, Washington.

Answer: Arney Burns, Chief Officer, Alaska Steamship Company. P. A. Teichroew, Purser, Alaska Steamship Company. J. Johanson, Foreman-Stevedore, Alaska Terminal and Stevedoring Company.

Interrogatory No. 13: Please state whether or not any portion or portions of the cargo of salt herring mentioned in the amended libel was overstowed with any other cargo or material; and if so, give a description of the type of such cargo or material and the amount thereof.

Answer: No cargo was stowed on top of the barrels of herring in No. 3 lower hold, but some cases of canned salmon were stowed on top of the barrels of herring in No. 4 lower hold. As there was nothing but canned salmon in No. 4 lower hold except the salt herring, it is not known definitely how many cases of such salmon were stowed on top of the herring. [58]

Interrogatory No. 14: Please state the acts constituting negligence of the officers or crew or other agents of the respondent or of the vessel, which negligence is alleged to consist of faults or errors in navigation or in the management of the vessel, and for which the respondent and the vessel are alleged in paragraph III of Respondent's First Affirmative Defense to be executed from liability pursuant to the applicable provisions of the Carriage of Goods by Sea Act.

Answer: There was no negligence, faults or errors in navigation or in the management of the vessel known to respondent.

Interrogatory No. 15: Please state how many of the barrels of salt herring mentioned in the amended libel were discharged from the Denali prior to the strike and stoppage of work by the Maritime Unions at the Port of Seattle alleged in paragraph II of Respondent's Second Affirmative defense.

Answer: 971 out of a total of 1358 barrels of herring stowed in No. 3 lower hold were discharged at Bell Street Terminal, September 4, 1946, between 8:15 a.m. and 12:00 o'clock noon. A stop-work meeting was called for 11:00 a.m. September 4 and sailors thereafter did not return to the vessel. This strike ended midnight September 12 and was followed immediately at 12:01 a.m. September 13 by a further strike, the sailor pickets being immediately replaced by the cooks' and stewards' pickets, which said strike continued until midnight September 22, 1946. From September 23, 1946 through midday September 26, 1946, SUP members refused to return to work. The sailors started to ship crews and return to work shortly before noon [59] September 26. The balance of the salt herring was discharged from No. 4 lower hold about September 26, 1946.

Interrogatory No. 16: Please state whether any of the barrels of salt herring mentioned in the amended libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

Answer: Some barrels discharged before the strike from No. 3 lower hold were alleged to be

damaged, but respondent does not know how many. Mr. Johanson, who superintended the discharge of said cargo, states that after about 100 barrels had been discharged on September 4, 1946 "I was informed by the dock that contents of the barrels were spoiled."

Interrogatory No. 17: State the day and the hour when the Denali was required to suspend discharging her cargo as a result of the strike and stoppage of work mentioned in Respondent's Second Affirmative defense.

Answer: 11:00 a.m., September 4, 1946, but officially 7:00 a.m., September 5, 1946.

Interrogatory No. 18: State the time of the day on September 25, 1946 when the strike and stoppage of work alleged in the Second Affirmative defense ended.

Answer: Sailors strike ended midnight September 12, followed by Cook's and Steward's Strike at 12.01 a.m., September 13, ending midnight September 22, followed by a refusal to work until midday September 26.

Interrogatory No. 19: When were the remainder of the barrels of salt herring mentioned in the amended libel discharged from the Denali after termination of such strike and [60] stoppage of work on September 25, 1946?

Answer: September 25, 1946, 1:45 p.m. to 3:45 p.m.

Interrogatory No. 20: State whether any survey or inspection was made of the barrels of salt herring mentioned in the amended libel at or after

the time of discharge from the Denali at Seattle by any employee, officer, or agent of respondent; whether or not such survey or inspection was made alone or jointly with any other person; the dates of such surveys or inspections, if more than one, and the name or names of the persons making the same.

Answer: Survey was made by James Gow on September 5, 1946 and subsequent dates. Respondent also understands that Libelant had a surveyor present.

Interrogatory No. 21: If a survey or inspection was made as stated in Interrogatory No. 20, state whether the salt herring mentioned in the libel was found to be in a damaged condition, and the apparent cause thereof, such as freezing, exposure to heat, contamination, or other cause.

Answer: The survey states:

“Inspection of these herring showed the flesh of the fish soft, the brine oily, and the valueless fish in the first stage of decomposition. * * *

“There are a number of conditions which could cause the conditions found, fish being held too long before packing, due to congestion at the cannery, improper curing and preparation and the barrels being subjected to warm conditions.

“We attribute this damage to inherent quality of the commodity prior to shipment, there being no conditions in our opinion wherein the carrier caused or contributed to the damage found.”

Interrogatory No. 22: State whether any inspection or survey was made of the salt herring men-

tioned in the amended libel [61] by respondent or anyone on its behalf at or about the time such salt herring was delivered to the Denali at Port Wakefield, Alaska.

Answer: No inspection was made of the herring at the time of loading. It was sealed in barrels.

Interrogatory No. 23: If respondent's answer to Interrogatory No. 22 was "yes", state the nature and extent of such inspection and what such inspection revealed as to the condition of such salt herring.

Answer: No inspection was made, nor is it customary for the ship to inspect such cargoes.

/s/ J. CHARLES DENNIS,
United States Attorney, Proctor for Respondent,
United States of America.

/s/ BOGLE, BOGLE & GATES.

/s/ CLAUDE E. WAKEFIELD,
Of Counsel.

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 16, 1948.

[62]

[Title of District Court and Cause.]

LIBELANT'S ANSWER TO RESPONDENT'S
INTERROGATORIES

Comes now the libelant and answers the interrogatories of the respondent as required by the rules and practice of this Court and particularly as

required by order entered herein April 10, 1948 modifying the order of January 19, 1948 by overruling libelant's exceptions to the interrogatories hereinafter set forth.

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Answer: Libelant does not know. The undersigned has been continuously engaged in the business of packing and processing salt herring from 1916 to the present time and has never experienced a loss of any kind from heat damage.

Interrogatory No. 11: At what temperature should barrels of salt herring be kept when stored to remain in sound and undamaged condition?

Answer: When herring is to be storage for long periods of time it should be kept in a cool room at temperatures in the neighborhood of 32° to 33° F. However, libelant [63] habitually stores salt herring for periods up to two months at normal outside temperatures encountered at its plant in Port Wakefield, Alaska. Libelant does not know the exact temperature range encountered at its plant in Port Wakefield, Alaska during the herring season, but alleges that it ranges approximately from a high of 66° to a low of 44°.

Interrogatory No. 12: For how long would a barrel of salt herring have to be subjected to the temperature mentioned in Interrogatory No. 11 to become damaged?

Answer: Libelant does not know.

Interrogatory No. 15: Is salt herring shipped from Seattle to New York or other east coast cities and, if so, how is it shipped (by rail or boat) and is it afforded refrigeration during such shipment?

Answer: Salt herring is shipped from Seattle to New York and other east coast cities by rail. In the winter time no refrigeration is required; in the summer refrigeration is always required.

Interrogatory No. 16: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage.

Answer: Libelant believes that the subjection of salt herring in barrels to heat of 70° for one week would damage it and render it unfit for food.

Interrogatory No. 17: State the maximum daily temperatures at Port Wakefield, Alaska between August 1, 1946 and [64] August 24, 1946 and state whether on each day it was clear, cloudy or rainy.

Answer: Libelant kept no record and cannot answer interrogatory No. 17, except that the weather was the same as usually encountered at Port Wakefield during the season in question. At the request of libelant the United States Department of Commerce, Weather Bureau, has furnished a statement of weather conditions at Kodiak, Alaska, the nearest point where weather observations are made to Port Wakefield, Alaska. Copies of this document and the explanatory letter of the

Weather Bureau are attached hereto and incorporated in this answer by reference.

LEE H. WAKEFIELD.

(Duy Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed April 22, 1948.

[65]

United States Department of Commerce
Weather Bureau

Climatological Section
Anchorage, Alaska
April 9, 1948

Edward M. Hay and David O. Hamlin,
Lawyers,

Colman Building
Seattle 4, Washington.

Dear Sirs:

In reply to your letter of April 7, 1948, requesting meteorological data from Port Wakefield, Alaska, we do not have weather reports from this location. Reports from Kodiak, Alaska, are the nearest to this location that we have available, a copy of which is being enclosed.

Under conditions that prevailed during this season, temperatures would not likely differ more than five degrees; winds would be similar in velocity but might differ considerably in direction; days with precipitation would largely be the same, but amounts could differ considerably; and the cloudiness would be nearly identical to the conditions at Kodiak.

Very truly yours,

OTTIS C. BOBBITT,
Climatological Supervisor. [66]

[Title of District Court and Cause.]

LIBELANT'S AMENDED ANSWER TO
RESPONDENT'S INTERROGATORY No. 10

Comes now the libelant and amends its answer to respondent's Interrogatory No. 10 as follows:

Interrogatory No. 10: State from your experience what is the maximum temperature to which barrels of salt herring can be subjected before becoming damaged by such temperature.

Answer: Libelant does not know. The undersigned has been continuously engaged in the business of packing and processing salt herring from 1916 to the present time and has never experienced a loss of any kind from heat damage prior to the loss alleged in the libel herein.

Libelant alleges that this amendment is made necessary by an inadvertent omission of its prior answer to such interrogatory.

LEE H. WAKEFIELD. [68]

(Duly Verified.)

(Acknowledgment of Service.)

[Endorsed]: Filed June 17, 1948. [69]

[Title of District Court and Cause.]

COURT'S DECISION

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington, July 22, 1948—2:00 p.m.

* * * *

The Court: Much of the law which libelant has cited in support of the libelant's position in this

case is applicable to cargo not concealed in sealed containers. In the case at bar the cargo of mild salt cured herring was contained in sealed barrels continuously from the beginning of the curing process in Alaska until the cargo was discharged from the ship [70] at Seattle, except when each barrel was opened to check brine and add more herring to take up shrinkage.

The Court is not convinced from the evidence that any thorough inspection of the cargo was ever made from the time the herring was first put in the barrels until the cargo was discharged from the ship at Seattle, although the witness Wakefield in effect testified that the condition of the herring already in the barrels was always observed when they were checked for shrinkage and supplied with additional herring to fill up the shrinkage during the curing process, and that the herring in question was subjected to that check up.

The witness Wakefield gave detailed testimony as to the history of this cargo and its care and conditioning. He testified as to the delivery from the fishing boats of fresh herring at his saltery at Port Wakefield. He testified as to the culling out of bad fish and as to the care and attention given the fresh herring preparatory to subjecting it to the curing process. He testified to the care and attention given to the placing of the fresh herring in these barrels and of the introduction of brine and of the sealing of the barrels, and of the later opening of the barrels, draining off part of the brine and adding additional fish to take up the [71]

shrinkage. In effect he testified that the same care and grading of the herring in selecting sound and merchantable herring for the salt curing process were applied in this case as had been usually practiced at his saltery and that the same saltery process was applied to this shipment of herring, the same curing process, the same treatment of opening the barrels, draining off part of the brine before the salt curing process was completed, and of adding more fresh herring to the barrels to take up the shrinkage, just as had been done in other salt curing processes at this plant, and that this salting process of this particular cargo was according to his usually practiced method.

There was no testimony to contradict that testimony that the salt herring contained in these barrels, and the subject of litigation, was the same kind of merchantable salt herring which this libellant had produced at the same saltery and shipped in other shipments at other times. There is no evidence to the contrary. Therefore, it seems to me that the Court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was, when it was received on board the ship at Port Wakefield, Alaska, as a matter of [72] fact in apparent good order and condition.

It may be as contended by respondent that the recitation in the bill of lading of "apparent good order and condition" should, in view of the fact that this cargo was in sealed containers, be applied as a matter of law only to the outward appearance

of those containers rather than to the cargo contained in the containers. Accepting for the moment, for the purpose of considering the point, that such is the effect and the only effect of such recitation in the bill of lading, still the Court finds, concludes and decides from a preponderance of the evidence, here introduced as to the process I have already referred to, and as to the care and attention given to the curing process as shown contradicted by all of the evidence upon that point in this case, that the condition of the contents of these barrels (and not merely the outward condition of the barrels themselves) was in fact in good order and condition when received on board this ship. There is nothing in the circumstance of storing some of the barrels containing some of the cargo on the face of libelant's dock at Port Wakefield for a few days awaiting the arrival of the ship which compels the inference that the contents of the barrels must have been damaged by [73] reason merely of being stored for those few days on the face of that dock, in view of the favorable weather conditions for outside temporary storing of this kind of cargo at that season.

By a preponderance of the evidence it was further established that some of this cargo where it was stowed in the respondent's ship, either in number 3 lower hold or in number 4 lower hold, was stowed in the space between the shaft alleys inside of which ran certain steam pipes, and that in that hold space there was an 80-degree Fahrenheit temperature 15 hours after the cargo had been dis-

charged and only about five hours after a strike became effective and all hands left the ship. It may reasonably be inferred that the ship's machinery—that which might produce heat in the hold as well as that which might cool the heat out of the hold—had been shut down at the time the strike became effective. However, it seems to the Court that the inference is compelling that there were an excessive temperature and heat in that cargo space at and before the time of the discharge of this cargo, and that such excessive temperature and heat caused the cargo damage here complained of. There was some oral testimony to the effect that while the unloading of [74] the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary.

The Court finds that at and before such time of discharge such temperature in the hold was excessive notwithstanding the fact that the respondent adduced testimony tending to show that inspections were made of the temperature in the hold at intervals during the voyage while the cargo was aboard respondent's ship and found no excessive temperature in the hold at the time the inspections were made, and notwithstanding other testimony that at another or other times no excessive heat was found by others of respondent's witnesses.

The Court also has considered the evidence now before the Court in the form of Libellant's Exhibit 16 which establishes among other facts that other cargos of this same character and cargoes of perishable and semi-perishable nature had previously

been successfully carried in this cargo space, and further that on this same voyage cargo of this very same kind was successfully carried, without experiencing damage, from another Alaskan port, namely, Port Vita, to the same port of destination as that at which libelant's cargo was discharged. But Libelant's [75] Exhibit 16 discloses the fact that the Port Vita shipment was stowed not in numbers 3 or 4 holds but in number 1 lower hold.

The evidence does not affirmatively show in number 1 hold conditions different from those in numbers 3 and 4 respecting machinery or heating pipes or heat transmitting pipes which might cause any difference in temperature; but counsel for libelant has argued there were not, and the evidence does not indicate that there were, any heating pipes or steam pipes running through or alongside or anywhere near that number 1 hold space, because it is forward of the engine room and not aft of the engine room.

As already indicated, the Court concludes that by a preponderance of the evidence it is established that the contents of these barrels of salt cured herring were received on board this ship at Port Wakefield at the beginning of this voyage in good order and condition, and that, the libelant having established that fact, the burden in this case shifted to respondent to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment, or that that damage was caused by in herent vice

of the contents [76] of the barrels. This burden respondent has not sustained. Instead, the preponderance of the evidence compels the Court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in numbers 3 and 4 holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4, during the voyage and before discharge of the cargo on or before the 4th day of September, 1946, although the damage may have possibly increased in degree during the strike after that date, but, if so, the amount of such increase if any is not ascertainable from the evidence now before the Court.

For the reasons stated the Court does find, conclude and decide this case in favor of the libelant and against the respondent for the difference in the market value of this cargo at Seattle, if it had there been in like condition as when shipped, and its actual condition in which it was when there discharged, plus the normal and necessary charges expended in connection with this shipment which would ordinarily have been experienced in connection with the normal movement of any other similar shipment under like circumstances in moving such a shipment at [77] the Port of Seattle. As to those expenses, if there are any further questions the Court will consider them upon the request of counsel.

Concluded.

[Endorsed]: Filed June 29, 1948.

[78]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter having come on regularly for trial before the undersigned District Judge on July 13, 1948 and thereafter, Libelant appearing in person and by David O. Hamlin and Axel C. Julin, of proctors for Libelant; Respondent appearing by Claude E. Wakefield and M. Bayard Crutcher of Bogle, Bogle & Gates, of proctors for Respondent; witnesses having been sworn and heard, evidence received and the cause having been fully argued; the Court having duly considered all matters involved herein and having heretofore announced its oral decision; now, therefore, in accordance with said oral decision the Court makes the following

FINDINGS OF FACT.

I.

At all times hereinafter mentioned Apex Fish Company, Libelant herein was and now is a corporation organized and existing under and by virtue of the laws of the State of Washington having its principal office and place of business at Seattle, King County, Washington, within the above judicial district and has paid all license fees.

II.

That Lee H. Wakefield and Laverne E. Wakefield are [79] residents of Seattle, King County, Washington and at all times since January 13, 1947 have been and now are the duly designated, elected

and qualified trustees of the said corporation and of all of its assets and powers for the purpose of winding up its affairs in voluntary dissolution.

III.

That at all times herein mentioned the Respondent, The United States of America, was and still is a sovereign power which has by law consented to be sued herein.

IV.

That at all times material to the Libel the Respondent, The United States of America was the owner and operator of the steamship "Denali" and was the carrier of the cargo hereinafter mentioned.

V.

That at all times herein mentioned said vessel was either a public vessel of the United States of America or employed by the Respondent as a merchant vessel and in either event was operated by or on behalf of the Respondent as a common carrier of merchandise for hire.

VI.

That if said vessel had been privately owned or possessed at the time of filing and service of the Libel herein, a proceeding in admiralty in rem and in personam could have been maintained against said vessel and against her owner by Libelant for the loss and damage alleged in the Libel as amended; that Libelant has elected to proceed upon the principles of both a libel in personam and a libel in rem. [80]

VII.

That the steamship "Denali" was at the time of the service and filing of the original libel herein within this district and within the jurisdiction of this court.

VIII.

That on August 23, 1946 Libelant delivered to Respondent at the port of Port Wakefield, Alaska certain merchandise in good order and condition, to-wit: 110 quarter barrels of salt herring, 119 half barrels of large salt herring and 1129 half barrels of medium salt herring to be carried from said port of shipment to the port of Seattle, Washington and there to be delivered in like good order and condition as when shipped to the order of James Farrell & Company in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the Warship short lading Form then and there signed and delivered to said shipper by the duly authorized agent or representative of the Respondent.

IX.

That thereafter Respondent loaded all the aforesaid merchandise aboard the steamship "Denali" and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington on September 4, 1946 still having the said merchandise aboard, but not in like good order and condition as when delivered to Respondent, but damaged, destroyed and a portion thereof rendered wholly valueless; that the sole, direct and proximate cause

of such damage and deterioration of said cargo was Respondent's exposure of the same to excessive heat in lower holds 3 and 4 while in the custody of Respondent during the voyage and/or before discharge; that in so [81] exposing the said cargo and shipment of libelant to heat, respondent was guilty of negligence in the loading, handling, stowage, carriage, keeping, custody, care and discharge thereof; that there was no excuse for such negligence, nor were there any conditions nor circumstances excusing nor relieving respondent from liability for the damage caused by such negligence.

X.

That at all times material to this proceeding Libelant was the sole owner of said merchandise and the sole owner of the right to sue and recover for the damage thereto.

XI.

That 971 of said half barrels were delivered to libelant by respondent at Seattle, Washington, on September 4, 1946, and that the remaining 387 half and quarter barrels were delivered to libelant at Seattle, Washington on September 25, 1946; that the market value of said shipment of salt herring at the time and place of delivery by Respondent to Libelant in the condition in which it would have arrived, but for the carrier's fault, was \$27,876.00 computed as follows:

110 quarter barrels medium at \$13.00 each.....	\$ 1,430.00
119 half barrels large at \$23.00 each.....	2,737.00
1129 half barrels medium at \$21.00 each.....	23,709.00
	<hr/>
	\$27,876.00

That the market value of said shipment of salt herring at the time of delivery by Respondent to Libelant at Seattle, Washington in the condition in which by reason of the fault of Respondent it did arrive and the amount of salvage which was actually recovered from sale of said shipment, was \$10,329.00 computed as follows: [82]

596 half barrels medium at \$15.75 each.....	\$ 9,387.00
21 half barrels large at \$8.00 each.....	168.00
79 half barrels medium at \$8.00 each.....	632.00
22 quarter barrels medium at \$5.00 each.....	110.00
8 quarter barrels medium at \$4.00 each.....	32.00
	<hr/>
	\$10,329.00

That of said shipment 80 quarter barrels medium salt herring, 98 half barrels large salt herring and 454 half barrels medium salt herring totaling 632 in all where unfit for human consumption and valueless; that the difference between the market value of the said shipment at the time and place of delivery to libelant at Seattle, Washington in the condition in which it would have been delivered, but for Respondent's fault, and its market value in the condition in which by reason of such fault it was delivered is \$17,547.00;

That prior to its arrival at Seattle, Washington said shipment had been sold by Libelant subject to approval of condition by the buyers and was destined if accepted by the buyers to move directly from the ship to railroad cars; that solely by reason of its damaged and deteriorated condition said shipment was rejected by the buyers thereof upon its arrival in Seattle; that as a direct and proximate result of the damaged and deteriorated

condition of said cargo caused by the fault of Respondent Libelant incurred normal and necessary expense in the care, culling, storage and preservation of said shipment and in the surveying of said damage over and above the charges said shipment would have incurred, but for the fault of Respondent, in the reasonable amount of \$1236.92.

XII.

That Libelant has fully performed all of the terms and conditions of said contract of carriage by it to be done [83] or performed.

XIII.

That this action is brought under the Act of March 9, 1920 known as the Suits in Admiralty Act and also Chapter 95, 41 Statutes at Large, 525, 46 U.S.C., Section 741 to 752, inclusive, and also pursuant to and by virtue of authority given in the Suits in Admiralty (Public Vessels) Act of March 3, 1925, Chapter 428, 43 Statutes at Large 1112, 46 U.S.C., Section 781 to 790, inclusive; and such proceeding is within the admiralty and maritime jurisdiction of the United States and of this Court.

To the foregoing Findings of Fact, the Respondent excepts and such exception is allowed.

Done In Open Court this 2nd day of August, 1948.

/s/ JOHN C. BOWEN,
District Judge.

From the foregoing Findings of Fact, the Court makes the following

CONCLUSIONS OF LAW.

1. That the respondent was negligent in the stowage and care of the cargo of salt herring here in suit and that such negligence was the sole and proximate cause of the damage thereto and to the libelant herein.

2. That libelant have and recover judgment against the Respondent, United States of America, in the sum of \$18,783.92, together with its costs and disbursements to be taxed herein.

To the foregoing Conclusions of Law the Respondent [84] excepts and such exception is allowed.

Done In Open Court this 2nd day of August, 1948.

/s/ JOHN C. BOWEN,
District Judge.

Presented by:

DAVID O. HAMLIN,
Of Proctors for Libelant.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 2, 1948.

[85]

In the District Court of the United States for the
Western District of Washington,
Northern Division.

In Admiralty No. 15091

APEX FISH COMPANY,
a corporation,

Libelant,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

JUDGMENT AND DECREE

This Matter having come on regularly for trial before the undersigned District Judge on July 13, 1948 and thereafter, Libelant appearing in person and by David O. Hamlin and Axel C. Julin, of proctors for Libelant; Respondent appearing by Claude E. Wakefield and M. Bayard Crutcher of Bogle, Bogle & Gates, of proctors for Respondent; witnesses having been sworn and heard, evidence received and the cause having been fully argued; the Court having duly considered all matters involved herein and having heretofore announced its oral decision, and having heretofore entered herein its Findings of Fact and Conclusions of Law; now, therefore, in accordance therewith it is

Ordered, Adjudged and Decreed that the Libelant, Apex Fish Company, have and recover judgment against Respondent, The United States of America, in the sum of \$18,783.92, together with interest thereon at 4% per annum from the 2nd day of August, 1948, together with its costs herein

taxed in the sum of \$64.50; ~~that the said judgment bear interest at the rate of 4% per annum for the period provided by law.~~ [J.C.B.]

Done In Open Court this 2nd day of August, 1948.

JOHN C. BOWEN,

District Judge.

[86]

Presented by:

DAVID O. HAMLIN,

Of Proctors for Libelant.

Entered on Admiralty Docket Aug. 2, 1948.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 2, 1948.

[87]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judges of the Above Entitled Court:

Respondent, United States of America, in the above entitled cause, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and Bogle, Bogle & Gates and Claude E. Wakefield, of Counsel to the said United States Attorney, being aggrieved by that certain final order, to-wit, the judgment and decree filed and entered in the above cause on August 2, 1948, hereby claims an appeal therefrom and from the whole thereof, to the United States Circuit

Court of Appeals for the Ninth Circuit, and prays that such appeal be allowed forthwith.

Dated this 25th day of October, 1948.

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[88]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS BY RESPOND-
ENT UNITED STATES OF AMERICA

Respondent, United States of America, hereby assigns error in the trial and proceedings before the Court and in the Findings of Fact and Conclusions of Law and Judgment and Decree entered and filed on the 2nd day of August, 1948, as follows:

1. That the Court erred in awarding to the libellant recovery in this action and entering judgment and decree in the sum of \$18,783.92, together with costs, or any other sum for recovery.

2. That the Court erred in making and entering Finding of Fact VIII in respect of finding that the shipment as received by respondent on board the S.S. Denali at Port Wakefield, Alaska on or about August 23, 1946 was then in good order and condition.

3. That the Court erred in making and entering Finding of Fact IX in respect to the following findings:

(a) That shipment was not delivered by respondent to libelant in like good order and condition as when received by respondent;

(b) That shipment was damaged, destroyed or deteriorated by reason of exposure to excessive heat in lower holds No. 3 and No. 4 during the voyage in question and before discharge from the vessel;

(c) That shipment was exposed to excessive heat or any undue heat while on board respondent's Steamship Denali; [89]

(d) That respondent was negligent in any respect concerning the loading, stowage, care, custody or discharge of the shipment in question;

(e) That shipment was damaged at all while being carried on board respondent's Steamship Denali;

(f) That there were no conditions nor circumstances shown by the evidence excusing nor relieving respondent from liability to libelant.

4. That the Court erred in making and entering Finding of Fact XI in respect of finding that the damaged or deteriorated condition of the shipment after discharge was in any respect due to any fault or negligence of respondent and that libelant was damaged in the sum of \$17,547.00, or any other sum, and that expenses of \$1,236.92 were reasonably incurred by libelant as a result of any fault or negligence of the respondent.

5. That the Court erred in making and entering Finding of Fact XII in respect of finding that libelant delivered sound, good, sufficient or proper shipment of barrels of herring to respondent for carriage from Port Wakefield, Alaska to Seattle, Washington.

6. That the Court erred in making and entering Conclusion of Law I that respondent was negligent in the stowage and care of the shipment and that such negligence was the proximate cause of damage thereto.

7. That the Court erred in making and entering Conclusion of Law II, that libelant have judgment against respondent for \$18,783.92, or any other sum.

8. That the Court erred in failing and refusing to find that libelant failed to sustain the burden of proving that the shipment of barrels of herring in question were in good order and condition when delivered to respondent in respect to concealed damage [90] to the mild cured herring contained in the barrels.

9. That the Court erred in failing and refusing to find that the shipment of barrels of herring in question was not in good order and condition when received by respondent from libelant, in that the barrels of herring, or some of them, were then spoiled and unfit for human consumption, or were then in such improper or deteriorated condition as to become spoiled and unfit for human consumption under proper conditions of ordinary stowage on the voyage in question.

10. That the Court erred in failing and refusing to find that No. 3 and No. 4 lower holds of the Steamship Denali between the shaft alleys where the shipments in question were stowed were then proper cargo spaces for the ordinary stowage of barrels of mild cured herring, and that the stowage afforded by respondent under the contract of carriage was proper stowage for the voyage in question.

11. That the Court erred in failing and refusing to find that there was no excessive heat or undue or improper heat in No. 3 lower hold between the shaft alleys in respect of the cargo of libelant under the contract of carriage not calling for cold storage or cool room stowage.

12. That the Court erred in failing and refusing to find that there was no excessive heat or undue or improper heat in No. 4 lower hold between the shaft alleys in respect of the cargo of libelant under the contract of carriage not calling for cold storage or cool room stowage.

13. That the Court erred in failing and refusing to find that respondent was not negligent in any respect in connection with the loading, stowage, care, custody and discharge of the shipment in question.

14. That the Court erred in failing and refusing to find [91] that the sole and proximate cause of the damaged and unfit condition of the shipment in question was the inherent vice of the shipment of mild cured herring in ordinary stowage on the voyage in question as contracted for by libelant,

and that no fault or negligence of respondent, or its Steamship Denali, caused or contributed to the damage.

15. That the Court erred in failing and refusing to find that the damage to the portion of the shipment stowed in No. 4 lower hold (to-wit, 183 half barrels—medium; 94 half barrels—large; and 110 quarter barrels) resulted solely and proximately from the unavoidable delay in discharge of said hold due to the strike effective between September 5, 1946 and December 25, 1946, for which respondent is not liable within the bill of lading exceptions and Section 4(2)(j) of the Carriage of Goods by Sea Act, 1936 (46 U.S.C. 1304).

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[92]

[Title of District Court and Cause.]

ORDER GRANTING PETITION
FOR APPEAL

The above entitled cause having duly and regularly come on for hearing before the above entitled court, the undersigned Judge persiding, upon petition for appeal of respondent United States of America duly presented to this court, together with

the said respondent's assignment of errors heretofore filed with the Clerk of this court, and the court having considered the same; now, therefore

It Is Hereby Ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment and decree heretofore entered and filed on the 2nd day of August, 1948 in the above entitled cause, be and the same is hereby allowed.

It Is Further Ordered that the respondent United States of America is not required to file cost and supersedeas bond on appeal, and that stay of execution is hereby entered and granted.

Done In Open Court this day of October, 1948.

.....,

United States District Judge.

Presented by:

CLAUDE E. WAKEFIELD,
Of Counsel to the
United States Attorney.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[93]

[Title of District Court and Cause.]

ACKNOWLEDGMENT OF SERVICE

Service and receipt of a copy of the Petition for Appeal and Assignment of Errors in the above entitled cause upon appeal to the United States

Court of Appeals for the Ninth Circuit, all of which have been filed in the above entitled court and cause, and service of copy of the Order Granting Petition for Appeal and allowing said appeal, and of the Citation on Appeal are hereby acknowledged as of this day.

Dated this 25th day of October, 1948.

EDWARD M. HAY,

and

DAVID O. HAMLIN,

Proctors for Libelant.

[Endorsed]: Filed Oct. 25, 1948.

[94]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF EXHIBITS TO
THE UNITED STATES COURT OF APPEALS

The parties to this cause having stipulated for the transfer of all exhibits introduced and admitted in evidence at the trial of the above entitled cause to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, as part of the certified Apostles of Appeal in the above cause, except as to libelant's Exhibits Nos. 1, 2 and 3, and good cause appearing therefor, it is, hereby

Ordered that the Clerk of this court transfer to the United States Court of Appeals for the Ninth Circuit at San Francisco, California, all of the original exhibits introduced by the parties at

the trial of the above action and admitted in evidence, except libelant's Exhibits Nos. 1, 2 and 3.

Done In Open Court this 25th day of October, 1948.

JOHN C. BOWEN,
District Judge.

[Endorsed]: Filed Oct. 25, 1948.

[95]

[Title of District Court and Cause.]

PRAECIPT FOR APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

You will please prepare, certify and file with the United States Court of Appeals for the Ninth Circuit at San Francisco, California, Apostles on Appeal in the above cause, including therein the following:

1. Caption of the case.
2. Names and addresses of parties and proctors.
3. Libel.
4. Answer to libel and twenty-one interrogatories annexed thereto.
5. Order on libelant's exceptions to respondent's interrogatories.
6. Libelant's answer to respondent's interrogatories.
7. Amended libel.
8. Answer to amended libel.
9. Libelant's interrogatories propounded to respondent.

10. Order on respondent's exceptions to libelant's interrogatories.

11. Libelant's request for admissions under Admiralty Rule 32-B.

12. Respondent's answer to libelant's interrogatories. [96]

13. Respondent's answer to demand for admissions under Admiralty Rule 32-B.

14. Libelant's further answer to respondent's interrogatories (pursuant to order of court April 10, 1948—Item 10 *supra*).

15. Libelant's amended answer to respondent's interrogatory No. 10.

16. All testimony offered in evidence on behalf of the libelant.

17. All exhibits offered in evidence on behalf of the libelant and admitted by the court, except libelant's Exhibits Nos. 1, 2 and 3.

18. All testimony offered in evidence on behalf of the respondent, including deposition of Arney Burns and respondent's Exhibits A-1, A-2, A-3, A-4, A-5 attached thereto.

19. All exhibits offered in evidence on behalf of respondent and admitted by the court.

20. Opinion of the court entered July 22, 1948.

21. Findings of Fact and Conclusions of Law entered and filed August 2, 1948.

22. Final judgment and decree entered and filed August 2, 1948.

23. All notices, motions, stipulations, orders and other papers related to the appeal to the Circuit

Court of Appeals for the Ninth Circuit, including the following:

1. Petition for appeal.
 2. Assignment of errors.
 3. Order allowing appeal.
 4. Citation.
 5. Acknowledgment of service of petition, order, assignment of errors and citation. [97]
 6. Order transferring original exhibits to the Court of Appeals for the Ninth Circuit.
24. Endorsements or notations of dates of service and filing of all papers included in the said Apostles.
25. This praecipe.

J. CHARLES DENNIS,
United States Attorney.
BOGLE, BOGLE & GATES,
CLAUDE E. WAKEFIELD,
Of Counsel,
Proctors for Respondent.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

[98]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Wash-

ington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 98, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same, together with the Reporter's Transcript of Proceedings, the original of which is sent up as a part of this record, and the original exhibits, constitute the apostles on appeal from the Judgment and Decree of the United States District Court for the Western District of Washington filed and entered August 2, 1948, to the United States Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for preparing record on appeal herein, to wit:

98 pages at 10 cents (copies furnished), \$9.80; petition for appeal, \$5.00; total \$14.80.

I further certify that the costs of this record on appeal have not been paid to me for the reason that said appeal is being prosecuted by the United States of America.

I further certify that there is attached hereto the original citation on appeal issued in said cause.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District

Court at Seattle, in said District, this 30th day of November, 1948.

(Seal)

MILLARD P. THOMAS,
Clerk.

[Title of District Court and Cause.]

CITATION ON APPEAL

The President of the United States to the above named Libellant, Apex Fish Company, a Corporation,

Greetings:

You are hereby notified that in that certain cause in Admiralty in the United States District Court for the Western District of Washington, Northern Division, as entitled above, wherein Apex Fish Company, a corporation, is libellant, and the United States of America is respondent, an appeal has been allowed **by order of this court to the** United States Court of Appeals for the Ninth Circuit, upon the petition of the respondent therefor.

You are hereby cited and admonished to be and appear in the United States Court of Appeals for the Ninth Circuit in San Francisco, in the State of California, within forty (40) days from the date of this citation pursuant to an appeal allowed in the above entitled cause on the 25th day of October, 1948, to show cause, if any there be, why the final decree as entered in the above entitled cause, upon such appeal above mentioned, should

not be corrected and speedy justice should not be done in that behalf.

Witness the Honorable John C. Bowen, Judge of the United States District Court for the Western District of Washington, this 25th day of October, 1948.

(Seal) /s/ JOHN C. BOWEN,
United States District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 25, 1948.

In the District Court of the United States
For the Western District of Washington,
Northern Division.

No. 15091

APEX FISH COMPANY,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Before: The Honorable John C. Bowen, District Judge.

Seattle, Washington

July 13th, 1948, 10:00 o'clock, a.m.

Appearances: David O. Hamlin, Esq., and Edw. M. Hay, Esq., and Axel Julin, Esq., appearing for and on behalf of libelants; Claude E. Wakefield, Esq., and M. Bayard Crutcher, Esq. (Messrs. Bogle,

Bogle & Gates), appearing for and [1 *] on behalf of Respondent.

Whereupon, the following proceedings were had and done, to-wit:

The Court: Are the parties and counsel ready to proceed with the trial of Apex Fish Company against the United States?

Mr. Hamlin: Ready, your Honor.

Mr. Wakefield: We are ready, your Honor.

The Court: The Court at this time will hear counsel from their present stations respecting their opening statements which they think should be made.

First, I will hear counsel for libelant.

(Opening statement presented to the Court by counsel for libelant.)

Mr. Wakefield: If the Court please, in view of counsel's opening statement and what he intends to prove or show in his case in chief, I think possibly my opening statement could best be reserved if that is [2] satisfactory to your Honor.

The Court: That is agreeable. Call the libelant's first witness.

Mr. Hamlin: I wish at this time to offer in evidence Libelant's request for admission number 4 reading as follows:

"That at the time of the filing and service of the original libel herein, the S.S. Denali was within the above-entitled district and within the jurisdiction of this honorable court."

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

And the answer of the respondent thereto reading as follows:

“The libel was filed July 29, 1947, and respondent is advised that the same was served upon the Attorney General of the United States, August 4th, 1947. The S.S. Denali sailed from Seattle for Alaska on July 31st, 1947 and was not thereafter in Seattle until August 18th, 1947.”

The Court: Do you have a copy of that? Let the copy be marked. I assume that the original is [3] available for inspection.

Mr. Hamlin: I was under the impression that we could offer it orally, your Honor. Is it customary in this court to have it in writing?

The Court: I am not aware of any custom. I just assumed—without thinking really—that you had copies available and did wish to introduce the physical stipulation in evidence. If that is not true, you may disregard the court’s statement.

Mr. Hamlin: The original is in the files.

The Court: It is not in evidence as such unless the rules or law give it some evidentiary effect.

Mr. Wakefield: There is no objection to the offer, your Honor.

Mr. Hamlin: May we have those marked, your Honor?

(Articles of Incorporation of Apex Fish Company, marked Libelant’s Exhibit 1 for identification.)

(Minutes of Stockholders marked Libelant’s Exhibit 2 for identification.)

(Certificate of Dissolution, Apex Fish Company, marked Libelant's Exhibit 3 for identification.) [4]

Mr. Wakefield: No objection, your Honor.

Mr. Hamlin: I offer it in evidence.

The Court: Libelant's Exhibit 1 is now admitted.

(Libelant's Exhibit Number 1 received in evidence.)

Mr. Hamlin: Call Mr. Lee H. Wakefield.

LEE H. WAKEFIELD,

called as a witness by and on behalf of the libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your name, please?

A. Lee H. Wakefield. [5]

Q. Where do you reside, Mr. Wakefield?

A. Seattle.

Q. Are you an officer of Apex Fish Company?

A. Yes, sir.

Q. What office do you hold?

A. President and manager.

Q. Were you such an officer on January 13th, 1947?

A. Yes.

Q. Showing you what has been marked Libelant's Exhibit 2 for identification, can you tell me what that is, Mr. Wakefield?

A. It is a meeting of the stockholders of the Apex Fish Company.

The Court: Do you mean that thing is a pic-

(Testimony of Lee H. Wakefield.)

ture of a meeting or what other kind of a thing is it?

Q. (By Mr. Hamlin): Do you mean to state that that is the minutes, Mr. Wakefield?

A. Yes; it is the minutes of a meeting of the stockholders.

Q. Can you identify the signatures appended to those minutes? A. Yes, I do.

Q. Will you read them, please?

The Court: Silently, do you mean? It is [6] not in evidence as yet. Do you mean he should read it silently without speaking the words out loud?

Mr. Wakefield: If the Court please, I would like to raise no objection to the admission of this. It is a sufficient copy of the minutes.

Mr. Hamlin: Very well. I offer Libelant's Exhibit 2 in evidence.

The Court: It is now admitted and it is proper at this point or it may be proper at any other point to ask this witness to read the contents of this exhibit.

(Libelant's Exhibit 2 received in evidence.)

Q. (By Mr. Hamlin): Will you read the names of the signatures on that document, please, Libelant's Exhibit 2? A. I didn't hear you.

Q. Will you read the signatures on Exhibit 2, please?

A. Yes, sir. "Lee H. Wakefield; Laverne E. Wakefield; Howard Wakefield; and Carrol Orn.

Q. Are those all of the stockholders of Apex Fish Company? A. No.

(Testimony of Lee H. Wakefield.)

Q. Approximately what percentage does it—

A. That was all except my son who was back in Connecticut. He had a small interest. [7]

Q. About what per cent of the stock is represented in that Exhibit 2?

A. Well, it is—oh—90 odd per cent.

The Court: Do you know of any other Wakefield, other than members of your own family, being engaged in fisheries in the vicinity of Alaska?

The Witness: No, I do not except in the way of fishing. I know of a nephew of mine down at Ketchikan that is a trawler. Otherwise, there is no other Wakefield up there that I know of.

The Court: Has there been any other Wakefield connected in a proprietary manner with the fishing business in Seattle, so far as you know, other than members of your family?

The Witness: No, there is no other that I know of.

The Court: You may inquire.

Mr. Hamlin: May we have this marked, please? Libelant's Exhibit 3 is offered in evidence without objection, I understand by the respondent, it being a Certificate of Dissolution signed by more than a majority of the voting power of the stockholders of the Apex Fish Company. [8]

Mr. Wakefield: No objection, your Honor.

The Court: Admitted.

(Libelant's Exhibit 3 received in evidence.)

Mr. Wakefield: In order to facilitate further proof on Exhibits 2 and 3, the respondent admits

(Testimony of Lee H. Wakefield.)

that Lee H. Wakefield and Laverne H. Wakefield are trustees of the Apex Fish Company.

Mr. Hamlin: Will you further admit that they have qualified as such and the appointment of them has become effective?

Mr. Wakefield: Yes.

Mr. Hamlin: Thank you.

Q. (By Mr. Hamlin): Mr. Wakefield, how long have you been in the salt herring business?

A. Since 1916.

Q. In what capacity were you in that business in 1916?

A. I was president and manager of the companies that were packing the herring.

Q. Where?

A. At that time at Little Port Walter on Baranoff Island, Southeastern Alaska.

Q. How long did you remain in connection with the industry [9] in that capacity?

A. Until I think it was about 1923.

Q. During that period what were your duties in the office which you held?

A. Well, my duties were to supervise, hire the men that did the work, and also to sell the product.

Q. Did you actually go to the plant in Alaska during—

A. Every season, yes.

Q. Did you remain for any period of time or just visit?

A. Oh, I was there for quite some time during the packing season.

Q. What happened in 1923; what change occurred in your relationship?

(Testimony of Lee H. Wakefield.)

A. That was at the end of World War I when I got hit with a sledge hammer. I turned the business over to someone else.

Q. Did you go out of the herring business then?

A. No; no, I still remained.

Q. What did you do?

A. I packed herring, made oil and meal.

Q. Where was that done?

A. Red Bluff Bay, Alaska, and Port Ashton in Prince Williams Sound, Alaska.

Q. How long did you work at those two places?

A. I believe it was in '29 — '29 or '30 — I wouldn't [10] say positively now.

Q. What were your specific duties during that period?

A. Similar to what I had always done—supervising.

The Court: Did you know the man for whom the Port Ashland place was named?

The Witness: He was my partner in the early days—old Captain Ashland—Thomas.

The Court: He had no identity with an admiralty lawyer named Ashland?

The Witness: No, none whatever.

Q. (By Mr. Hamlin): Did you ever actually go into the physical work of preparing salt herring?

A. Yes, I did.

Q. When did you start that?

A. The first work I did directly in the plant was in '27.

Q. What did you do then?

(Testimony of Lee H. Wakefield.)

A. I did some gibbing, and packing, the same as the people I had hired before.

Q. What is gibbing?

A. Gibbing is taking two little fins and the main gut out of the herring. That is called gibbing—preparatory to salting.

Q. How much of it did you do? [11]

A. I didn't do any great quantity. We were up there very late that fall, and only had a few people that we kept up for the winter packing and I helped them out.

Q. When is the next time you entered into the actual work of the plant?

A. In '31 is when I took absolute charge of the entire operation.

Q. What were your duties from 1931 through to 1946, concluding that year?

A. I was curer, superintendent, manager of the plant. The curer usually had an assistant to help out, who was a cooper. Part of that time I did my own coopering, curing and the whole works—in '31 and '32.

Q. What company were you connected with at that time? A. Apex Fish Company.

Q. Did you go to the plant during the packing season in '31 and '32?

A. I was there the entire season.

Q. How about the years after that?

A. I was always there.

Q. During each packing season?

A. Yes.

(Testimony of Lee H. Wakefield.)

The Court: What connection if any did you [12] have with the Alaska fish industry prior to 1930 and '31?

A. Well, I had a number of salmon canneries and also herring plants combined.

The Court: Beginning what year?

The Witness: Beginning in '16, is when I started at Little Port Walter. Then in '17 and '18 I bought a plant at Red Bluff Bay. In '19 I financed and then took over from Captain Ashton Thomas. I unfortunately had to take over the plant at Port Ashton in 1919.

The Court: Following that year what happened; when did you sever your connection with the Alaska fishing industry?

The Witness: I continued as president and manager of the various plants.

The Court: In 1920, '21, '22, '23 and '24?

The Witness: Yes, continuously operating.

The Court: Up to what year?

The Witness: Well, up to the present time. I have never missed a year yet.

The Court: I mean with respect to the salmon business that you said you were in.

The Witness: Well, the salmon business I [13] closed out in either '29 or 30.

The Court: That is your salmon business?

The Witness: Yes—the plants. As a matter of fact, the banks closed me out.

The Court: Have you been engaged in the herring business since that time?

(Testimony of Lee H. Wakefield.)

The Witness: Continuously since that time.

The Court: You may inquire.

Q. (By Mr. Hamlin): Do you own stock in Apex Fish Company? A. Yes, sir.

Q. Approximately what percentage of it?

A. About 68 per cent. Some years ago I give some to my children.

Q. Will you detail generally the business which Apex Fishing Company is in?

A. Well, it was salt herring—making meal and oil from herring.

Q. Apex also has a meal and oil operation, has it?

A. Yes. We have a large operation up at Port Wakefield.

Q. Where is your plant located, Mr. Wakefield?

A. The plant is located on—oh, it is about 30 miles from Kodiak on Raspberry Island. Raspberry Island lies between Afognak and Kodiak Islands. [14]

Mr. Hamlin: May we have this map marked for identification please?

(Large Map marked as Libellant's Exhibit 4 for identification.)

Mr. Hamlin: I would like to have the witness mark on that Exhibit 4 the location of his herring plant which he has here testified about. I would like to advise the court and counsel that the main reason to introduce this is to show the location of the plant in so far as it ties in with Weather Bureau Divisions.

(Testimony of Lee H. Wakefield.)

The Court: In connection with the exhibit or elsewhere in the testimony the Court suggests that you have the facts stated by oral testimony.

Q. (By Mr. Hamlin): Showing you Libellant's Exhibit 4 for identification, can you tell us what that is, Mr. Wakefield—the whole exhibit, what is that piece of paper?

A. This is a geodetic map of Alaska.

The Court: Has it a number?

The Witness: Yes, it has. "Alaska Map E."

The Court: Does it have any initials to initials [15] to indicate whether or not it is official?

The Witness: Yes. "The United States Department of the Interior, Geologic Survey."

The Court: It is not a Coast Geodetic Survey Map, is it, or is it such a map?

The Witness: Well, I think that is what it would be considered. It shows the entire Alaska.

The Court: Is that map of the usual quality of Coast & Geodetic official maps of Alaska and Alaskan waters?

The Witness: Yes, it is, on a large scale. The islands show very small here where the sailing charts are made much larger and only cover a larger area.

The Court: Mr. Hamlin, is it offered as an official Coast and Geodetic Map of Alaskan waters?

Mr. Hamlin: I was under the impression that it was a publication of the Department of Commerce. I saw nothing to tie it in with the Coast and Geodetic Survey.

(Testimony of Lee H. Wakefield.)

The Court: You may proceed.

Mr. Hamlin: I offer Libelant's Exhibit 4 in evidence.

The Court: Has opposing counsel seen it? [16]

Mr. Wakefield: I have no objection to the authenticity of the map. I do object to it as not being material. I don't see the materiality of a map of Alaska.

The Court: Do you admit that it is an official map?

Mr. Wakefield: Yes.

The Court: The objection is overruled. Libelant's Exhibit 4 is now admitted.

(Libelant's Exhibit 4 received in evidence.)

Q. (By Mr. Hamlin): Mr. Wakefield, will you mark with your pen a circle where the plant of Apex Fish Company is located on Exhibit 4?

A. I have already marked it, sir.

The Court: Thank you. That is all with that exhibit.

The Witness: There is a red circle there, where the plant is located on Raspberry Island.

(Exhibit handed to the Court.)

The Court: Near what larger island is Raspberry Island?

The Witness: It lies right between Kodiak Island and Afognak Island. They are the two large [17] islands of the group.

The Court: Court will be at recess for about fifteen minutes.

(Recess.)

(Testimony of Lee H. Wakefield.)

The Court: The witness may resume the stand and you may now proceed.

Mr. Hamlin: I offer in evidence Libelant's Exhibit 5 which bears on its face the showing that it is a United States Coast and Geodetic Map Number 8534 purporting to show Marmot Bay and Kupreanof Strait.

The Court: Is there any objection?

Mr. Wakefield: None other than it is irrelevant and immaterial, your Honor.

The Court: For what purpose do you offer the exhibit?

Mr. Hamlin: For the purpose of showing the relative locations of Kupreanof Strait, Alaska, and Afognak Island, which subsequently will be shown in the evidence to be the nearest United States Bureau weather station.

The Court: The objection is overruled.

Libelant's Exhibit 5 is admitted in evidence.

(Libelant's Exhibit 5 received in evidence.)

Q. (By Mr. Hamlin): Will you describe your plant at Port Wakefield, Alaska, as it existed in July and August, 1946, please?

A. Well, the plant was the same then as it is now.

Q. Will you tell what it looked like physically; what facilities did you have there?

A. Well, we had—the size of the buildings, if you want that?

The Court: The number of buildings, the character of buildings and plants and facilities; describe them briefly.

(Testimony of Lee H. Wakefield.)

A. (Continuing): The plant itself is all one building, you might say. The in-shore end of it is where the boiler and meal plant is, and all of the outside end—which is one hundred feet square—is where the saltery is located, in the outside end of the building. Then, of course, the small dock on the face of the building.

Q. What two operations do you carry on there?

A. Just salt herring, meal and oil.

Q. Will you please state in detail how salt herring is processed by Apex at that plant, commencing with the delivery of the fish by the fishermen at the dock?

A. Well, when the fish come to the dock either I or my assistant would be there to check and see if they [19] were suitable quality for gibbing—for packing. If they were, then we ran them through a grader up in the saltery which graded out all of the smaller size herring, leaving only the larger sizes going into what we call a gibbing hopper. Then as soon as that was done and sufficient fish were unloaded, they would call out the saltery crew and start gibbing.

Those fish were examined, of course, as I say, when they first came to the plant to see what quality they were and if suitable for packing. Then when the gibbers came out, they would sort them again as they packed into two sizes, what we call medium and large, a medium herring being a fish that ran from ten and a half inches in length and the large from ten and a half to twelve

(Testimony of Lee H. Wakefield.)

and a half or anything over we put in as large. These gibbers, as I explained before, take out the gills and the main gut, throw the fish into a big gibbing bin behind them with two compartments, one for the large and one for the medium.

As they did that, after they would gib a few, we have what we call a "rowser"—a man that does nothing but go along and throw salt over the herring and then take and rowse them up with his hands until [20] there is salt surrounding every fish. The fish being wet, of course, the salt would adhere to them.

Then after that is done these gibbers pack them into the barrels in layers. They would put in one layer one way and then the next layer would go crossways. They keep criss-crossing until the barrel is full. Then, of course, during that time either myself or my assistant is watching out to see that they are graded properly, to the proper sizes, that the right amount of salt is put on.

And after the barrel is filled, the cooper comes along and heads it up—puts the head in.

After that is done, they role it out. And the man that is called our briner bores a hole in one of the staves in about the middle of the barrel and pours in whatever brine they will take at that time, which usually runs from one-half gallon to a gallon. After that is done the bung is put back in the barrel and they are stowed away for curing.

The cure runs anywhere from seven to twelve days, depending on circumstances. They cure quite

(Testimony of Lee H. Wakefield.)

thoroughly in seven days but ordinarily we try to repack when they have been about ten days in cure. In that way we take care of all the shrinkage. In ten days they will shrink from 19 per cent to 20 per [21] cent. Usually we allow about 20 per cent for shrinkage.

At that time, after they are in cure for that length of time, when we have slack season and we are not too busy gibbing, we roll out the various days packing that are in cure the proper length of time, take the head out of the barrel, and knock out the bung so that the brine in the top half of the barrel will run out. That permits the herring to settle down about four to five inches in the barrel, which takes care of that shrinkage.

Then we take fish packed from the same day's gibbing and dump them into a big tub and those fish then are put into carts and the gibbers come along and refill these barrels and what we call putting on the topper. It takes usually three to four tiers of fish to bring the barrel up so that it is full to the top, after which they put the head back in, roll the barrel down on the side and put in whatever brine the barrel will take. Sometimes it takes only half a gallon, but whatever it will take they put in the barrel. Then, after it has been repacked and reheaded, they drive the bung home and then it is ready to ship. We roll that out, then, and pile it up ready for shipment. [22]

After that process is finished and the product is ready for shipment, and in each barrel, does each

(Testimony of Lee H. Wakefield.)

fish have on it a fishhead, or does it not have on it a fishhead?

The Witness: They all have heads on them.

The Court: Why is the fishhead left on the fish?

The Witness: I think that is more the habit of the buyer than anything else—that they are accustomed to buying originally.

Years ago we got most of the herring in from Scotland and that was the type of pack we were copying in this country was the Scotch cure and the Scotch pack. They gibbed and left the head on.

As a matter of fact, in the early days of packing they wouldn't buy fish if they had the heads on.

Now, however, they do get some with the heads on.

The Court: Do you know of any other reason, other than that historical one, why the head is left on the herring in this salting process you have discussed?

The Witness: No, I do not know any reason other than that. [23]

The Court: Would it not be easier and more efficient in the gibbing process if while the gibber is taking out those fins and the intestines as you have discussed the process previously, if you also cut off the head of the herring?

The Witness: I believe that the gibbing—taking the fins and the gills and the main gut is quicker than they could take that out and the head off.

(Testimony of Lee H. Wakefield.)

The Court: You think the gibbing process is more quickly accomplished by leaving the heads on than by taking them off?

The Witness: Yes, I believe it would be, Judge.

The Court: Proceed.

Q. (By Mr. Hamlin): You mentioned that when you went down to the fisherman's boat you made some segregation based on quality. Upon what do you base that segregation of the fish?

A. Well, as to the fatness of the fish and whether or not it had feed in it and the size. If there is not enough of a size suitable for packing, we would let them go straight through into the meal plant—into the big tanks back by the meal plant. If [24] there were enough of the sizes suitable for packing, then we would run them through this grader and grade out the larger sizes and start gibbing.

Q. Does it make much difference as to the time after the fish is caught before it is packed?

A. Yes, it makes a lot of difference. If the fish are caught too far away and have been in a storm or anything like that, and the fish are all washed up, we never attempt to pack them.

Q. How long a period would amount to too much time after the fish is caught?

A. Oh, if they are not churned up, as I explained, fish would be in good condition eight to ten hours after they are caught, before they come to the plant.

Q. How can you tell how long it has been since they were caught?

(Testimony of Lee H. Wakefield.)

A. Well, you can tell easily. Of course, in the first place we know all of the areas that the boats are fishing. We are in touch with them constantly with radio. We know just how long it takes them to come in. And by the look of the fish—if the fish are old they are soft and mushy. It is almost impossible to gib one when it is soft and mushy.

The Court: What did you mean by the phrase “all washed up”? [25]

The Witness: If a boat is in a storm and rolling around, these fish will slide down one side to another and wear all the scales off. They get very floppy and mushy from the motion of the vessel.

The Court: Is that condition what you referred to by the phrase “all washed up”?

The Witness: Yes, that is right.

The Court: Proceed.

Q. (By Mr. Hamlin): Is this method of packing salt herring that you have referred to a standard method or is that peculiar to your own company?

A. That is a standard method.

Q. How long have you used that method?

A. Since I started into the game in 1916.

Q. Calling your attention to the 1358 barrels of salt herring involved in this proceeding, will you kindly state the dates on which the fish in those 1358 barrels were packed and the number of half barrels packed each day?

A. I think I can give you that. On the 24th day of July, we packed 225 half barrels.

Mr. Hamlin: May it please the Court, I have a list. [26]

(Testimony of Lee H. Wakefield.)

The Court: Do you wish to mark the list for identification?

(Bill of Lading marked Libelant's Exhibit 6 for identification.)

(List marked Libelant's Exhibit 7 for identification.)

Mr. Hamlin: I offer in evidence Libelant's 6, Bill of Lading, covering the shipment in suit herein.

Mr. Wakefield: No. objection.

The Court: Admitted.

(Libelant's Exhibit 6 received in evidence.)

The Court: Is it a fact that that bill of lading covers the Libelant's entire shipment here in question?

Mr. Hamlin: Yes, Your Honor.

The Court: Proceed.

Q. (By Mr. Hamlin): Will you proceed with your statement, Mr. Wakefield?

A. Then on the 26th of July—— [27]

The Court: Is that next after the 24th?

The Witness: On the 25th, 102; on the 26th, 100; on the 27th, 74.

The Court: Do you mean 74 barrels?

The Witness: 74 half-barrels on that day. Then we skipped the 28th, the 29th, and the 30th,—had no fish in at that time. On the 31st we packed 78 half-barrels. On the first of August we packed 24 half-barrels; nothing on the 2nd. On the 3rd of August we packed 252; the 4th, 29; the 5th, 23; the

(Testimony of Lee H. Wakefield.)

6th, 155; the 7th, 125; the 8th, 43; the 9th, 278; and on the 10th, 53.

Those are the fish that were repacked into the shipment that is in question.

Q. (By Mr. Hamlin): I note that the figures you have read totaled 1351 half-barrels. Can you account for the difference between that figure and the 1358 which you actually shipped?

A. That is accounted for by the shrinkage in cure, while they were curing.

The Court: And the number of one-half barrels was what?

Mr. Hamlin: 1358 except that there are——

The Court: Let it be established by the [28] testimony rather than by the statement of counsel.

Will the witness state the fact if he knows it?

How many were shipped on board the vessel?

The Witness: I don't have that lading here. I turned it over to counsel. The amount stated, however, I am very sure is correct from the lading. There were 110 quarter-barrels, I know, in the shipment.

The Court: The bill of lading, Libellant's Exhibit 6, which has been admitted in evidence, lists 110 quarter salt herring, 119 half barrels large salt herring, and 1129 half barrels medium salt herring.

Are those the ones referred to as having been shipped according to the claim of libellant?

The Witness: Yes, sir; that is correct.

The Court: How many does it total; does that total 1358?

The Witness: I believe that is correct, Judge.

(Testimony of Lee H. Wakefield.)

Q. (By Mr. Hamlin): Do you have libelant's Exhibit 7 before you, Mr. Wakefield?

A. Yes, sir. [29]

Q. Will you kindly state where the figures appearing on Libelant's Exhibit 7 were obtained?

A. From the pack records in our office.

Q. Did you keep those records yourself?

A. No. We had a bookkeeper to keep the records.

Q. I mean, did you make the original pack records? A. Yes, I did.

Q. Did you superintend the preparation of that Exhibit 7 that has that information appearing on it?

A. Yes, I did.

Q. Did you take it from those pack records?

A. Yes, sir.

Mr. Hamlin: I offer Libelant's Exhibit 7.

Mr. Wakefield: There is no objection, Your Honor.

The Court: Admitted.

(Libelant's Exhibit 7 received in evidence.)

Q. (By Mr. Hamlin): Did you put any dates on these barrels that you talked about?

A. Yes. They were all stenciled on both ends.

Q. What was on the top?

A. The top of the barrel was "Alaska Fat Herring, Wakefield Brand."

And then the size was stencilled in, whether [30] it was medium or large, and on the lower part of the stencil was the net weight on the barrel and "Apex Fish Company."

(Testimony of Lee H. Wakefield.)

Q. What was on the bottom?

A. A diamond "W" stencilled on the bottom.

Q. Did you make any record of the date that these barrels were put up, on the barrel itself?

A. Always, yes. They use a blue crayon to mark the date they are packed and the number of the girl that gibs that particular barrel.

Q. Where is that mark put?

A. That is put on the bottom of the barrels.

The Court: Are the gibbers usually Alaska native women?

The Witness: No. Most of them are taken from Seattle. The majority of the gibbers do nothing but gib herring. They make enough during the summer——

The Court: Is there enough among Seattle residents to whom this gibbing work appeals or does it appeal to any and all women who wish to have employment in the canneries?

The Witness: It is mostly Norwegian and Scotch people that follow that work. '

The Court: You may inquire. [31]

Q. (By Mr. Hamlin): What was your maximum daily packing capacity in the salt herring division of your plant during the period from July 24th to August 10th which you have just mentioned?

A. Well, our daily capacity would be around 300 half-barrels, with the number of gibbers I had.

Q. These dates which you have given us, starting with July 24th, indicate that approximately one

(Testimony of Lee H. Wakefield.)

month elapsed during which some of these fish were held at your plant and that others were held for progressively less periods as we come into August.

Now, is this period of one month unusually long in your operation up there?

A. No. That was about normal.

Q. Have you ever held it for longer than that?

A. Yes, we have.

Q. Up to what period?

A. Oh, I think we have held them for at least a month and a half.

Q. During what time of the year?

A. During the summer.

Q. Have you ever had any damage apparent from holding fish at the plant?

A. None whatever.

Q. Now, this method of packing which you have detailed,— [32] when I asked you to start at the fisherman and the boat and go on up, is that the way you packed these 1358 half-barrels?

A. Yes.

Q. What part did you personally take in the packing of these 1358 half-barrels?

A. I was usually out in the plant a good portion of the time. When I wasn't there, my assistant was watching over it.

Q. Did you ever go down and meet the fishermen when they brought the fish in?

A. Oh, frequently.

Q. For this shipment?

(Testimony of Lee H. Wakefield.)

A. On every shipment,—practically all during the packing season.

Q. Approximately what percentage of the time would you say that you met the boats which brought in this particular shipment?

A. Oh, I think at least 50 per cent of it I would meet the boats.

Q. Did anyone go down in your absence?

A. Yes. My assistant curer would also go down. If the boat came in late at night and I didn't want to get up, they would go and get the curer to inspect it before they started to unload. [33]

Q. Who was your curer?

A. A man by the name of Jake Frasier.

Q. How long has he been in this business of packing salt herring?

A. Practically all of his life. He was a curer in Scotland before he came to this country.

Q. How long has he worked for you?

A. I think for about seven or eight years.

Q. This repacking you have talked about—I am referring specifically now to the shipment in suit herein—was repacking done every day or was it affected by other factors up there?

A. No. Repacking isn't done every day. It is usually done when you have no fish in for gibbing. And fish that are cured sufficiently so that they could be repacked would be done when there is a slack day on gibbing and packing.

Q. I notice on Libelant's Exhibit 7 that during the last six days before August 23rd you only

(Testimony of Lee H. Wakefield.)

packed seven barrels of fresh herring—seven half barrels—what was your crew doing during that period?

A. They were probably waiting for a storm to go down so they could go out and catch the fish.

Q. Were they idle during all of that time? [34]

A. Yes. My crew in the saltery would be busy repacking during that time, just prior to the time we expected a steamer.

Q. What did you mean when you said that somebody was idle during that time?

A. I meant the fishermen were idle. During the storm the fishermen can't fish and that is why we were idle all of those days without any fish. During that time then we tried to catch up on repacking and get as many ready for shipment as we can.

Q. Did you participate in that repacking during those days?

A. Always, yes.

Q. Were any spoiled or deteriorated fish found during that repacking period?

A. None whatever,—not one.

Q. Going back to the gibbing operation for just a moment. Is any inspection or segregation of the fish based on quality made by the gibber? I mean assume that they found a fish that was soft or spoiled, what is done with it?

A. They are all instructed and do throw away any fish that is bruised from unloading or anything of the kind. They do not gib that kind of a fish. As a matter of fact, sometimes they will pick up a fish [35] and gib it before they notice that it has

(Testimony of Lee H. Wakefield.)

been cut by the elevator. They throw that down and it goes on back to the meal plant.

Q. Is there some facility available to them at the table there so that they can dispose of that fish to the meal plant, right where they work?

A. Oh, yes. They have a chute right close at hand where they shove all of the small fish down. Well, any fish that is broken, it goes right down with the small fish onto the carrier and goes back to the meal plant from the saltery.

Q. Is that the same way they dispose of cut or small fish, too?

A. They go down with the small fish, too.

Q. Where did you store the barrels involved in this 1358 half-barrel shipment after they were first packed?

A. Well, at the first packing we stored all of them inside the warehouse, which is quite large. The first repacking was stored inside of the building.

Q. Is that building heated?

A. No; I should say not. It is quite cool out there in the saltery because the floor is always wet, and rather chilly.

Q. Is that building located on shore on on a dock? [36]

A. On a piling on a dock.

Q. Where were they stored after they were repacked?

A. Until just prior to the time a boat comes they are all stored inside.

(Photograph marked Libelant's Exhibit 8 for identification.)

(Testimony of Lee H. Wakefield.)

Q. You have mentioned that some barrels were placed on the dock before the arrival of the Denali, I believe. Where were they placed on the dock?

A. They were placed just in front of the building. As shown in the picture there, the dock is rather small.

Q. I would like to have you identify that picture there when the Court is through looking at it. Handing you Libelant's Exhibit 8 for identification, will you tell us what that is?

A. That is a picture of the front of the plant at Port Wakefield.

Q. Is that an accurate representation of the plant?

A. Yes. That is a good front view, there.

Q. Do you know who took the picture?

A. I think my son took it,—Howard. He is quite a camera fiend and has hundreds of pictures.

Mr. Hamlin: I offer Libelant's Exhibit 8.

Mr. Wakefield: No objection.

The Court: Admitted. [37]

(Libelant's Exhibit 8 received in evidence.)

Q. (By Mr. Hamlin): Calling your attention to Libelant's Exhibit 8, would you be so kind as to mark on it with a pen the exact area where you piled barrels awaiting shipment?

A. That is the area just in front of the building there, between the big tank and that door leading into the warehouse.

Q. Have you marked it with any particular symbol?

(Testimony of Lee H. Wakefield.)

A. I have got red marks on it there showing the area that the barrels would be piled in.

Q. In what direction are you looking when you look at that picture, Libelant's Exhibit 8?

A. Looking at that, you are looking from the northeast against the plant there. That plant stands about northeast and southwest.

Q. The dock faces northeast, does it?

A. Yes.

Q. Approximately how many barrels are you able to pile on the face of the dock as you have indicated on Libelant's Exhibit 8?

A. Well, when we pile out as near the face as we can and leave room for slinging the barrels when the steamer [38] comes, we have had I think close to five hundred.

Q. Will it hold any more than that?

A. No; not and leave room to load.

Q. Do you remember how many were put on the dock before this particular shipment in suit herein was placed aboard the Denali?

A. No, I do not recall the exact number.

Q. About how long before the Denali came did you pile some on the dock?

A. I think about the last week of packing we put out,—starting filling up the dock, so it would be ready for the steamer.

Q. Did you take any precautions with those barrels which you placed on the dock to protect them from damage from the elements?

A. Yes. We always cover them either with a tarpaulin or salt sacks. Salt sacks really are even

(Testimony of Lee H. Wakefield.)

better than a tarpaulin, because they hold the dampness when we spray them down.

Q. How often do you spray them down?

A. Oh, several times a day if it is at all warm.

Q. Was that done with this particular shipment?

A. That would apply to all shipments where they are put on a dock.

Mr. Wakefield: I move to strike the answer [39] as not responsive.

The Court: Granted. It is stricken. The court will disregard it.

Mr. Hamlin: Mr. Reporter, would you read the question to the witness, please?

(Last question repeated by the reporter.)

A. Yes.

Q. (By Mr. Hamlin): Who has charge of the wetting down of the barrels which are placed on the dock?

A. My assistant and myself.

Q. Did you personally wet down this shipment?

A. Many times, yes.

Q. Is the nature of the dock and the location of this place where you piled this shipment such that it is ever in the shade during the day?

A. Most of it would be in the shade of the building.

Q. During what part of the day?

A. Well, in practically all of the day; well, the early morning sun might hit the top tiers but after the sun has swung around to the south, why, the building shaded the place where the herring was piled.

(Testimony of Lee H. Wakefield.)

Q. How were they piled on the dock? [40]

A. They were piled on their side, three tiers high.

The Court: Where were they so piled?

The Witness: On the face of the dock; that is, right up against the face of the building.

The Court: How many days did they remain in that position, if you know?

The Witness: Well, I don't think at any time they were on the dock more than five or six days prior to the time a steamer would come because we had plenty of space inside.

Q. (By Mr. Hamlin): Was this piling on the dock a customary practice with you?

A. Yes, it is.

Q. Why do you do it?

A. To facilitate loading when the steamer comes there.

Q. Did this cargo remain on the dock in that fashion any longer than was usual with you?

A. No, it did not.

Q. Were you present when the SS Denali arrived on August 23rd? A. Yes.

Q. What kind of a landing did she make?

A. She made a port landing.

Q. Is that the way she usually landed? [41]

A. No. Most always she made a starboard landing.

Q. What effect did that difference in landing make in so far as loading the cargo was concerned?

A. Well, when she made her ordinary landing

(Testimony of Lee H. Wakefield.)

of starboard, it brought Number 1 hold right up to the dock. But making a port landing it brought Number 3 hold up to the dock, to face the dock.

Q. Did you enter the hold of the vessel where this cargo was placed? A. No, I never did.

Q. Were you present during the loading of the cargo? A. Yes.

Q. After loading was completed, I take it you were then given what has been admitted in evidence as Libelant's Exhibit 6, a bill of lading?

A. Yes, we were.

Q. Who handled the sale of this shipment of 1358 barrels?

A. P. V. Bright & Company of Chicago.

Q. And who represented the Apex Fish Company in effecting a sale? A. P. V. Bright.

Q. No. I mean who from your organization?

A. Oh, in my organization?

Q. Yes.

A. Well, I handled it myself from the plant. [42]

Q. I notice the bill of lading runs to a consignee named as James Farrell & Company. Who are they?

A. They are the brokers that handle all of the oil and meal from the plant. We shipped the herring to them and they supervised the loading of the cars for P. V. Bright, a broker in Chicago.

The Court: At this point the proceedings are recessed until 2:00 o'clock this afternoon.

(At 11:55 a.m., Tuesday, July 15th, 1948, proceedings recessed until 2:00 p.m., in the United States Court House.) [43]

Seattle, Washington, July 13, 1948, 2:00 p.m.

The Court: You may resume the examination of this witness.

LEE H. WAKEFIELD

(Resumed)

Direct Examination (Continuing)

Q. (By Mr. Hamlin): Going back to the packing that you referred to, I will ask you if you made any personal inspection of the fish at the time of repacking? A. Yes, sir.

Q. What was the extent of your inspection?

A. When the barrels are opened at the time of repacking I always go along and feel of the fish to see just what the cure is.

Q. What can you observe by feeling the fish?

A. Well, you can tell the extent of the cure.

Q. How can you tell?

A. Well, by the feel,—by the firmness of the fish you [44] can tell very close to what the strength of the pickle is and what it is necessary to put back on it when it is repacked.

Q. Do you change the strength of your brine at the time of repacking?

A. Yes. I can tell very closely from long years of experience.

Q. I say do you mix that repacking brine especially for the repacking?

A. No. For the repacking we draw some of the brine off from the fish that have been—what we call the blood brine,—and then we add 100 per cent pickle to that to bring it up to whatever degree of

(Testimony of Lee H. Wakefield.)

strength we want to put back in the barrel.

Q. Were you familiar with the market prices for salt herring prevailing in 1946?

A. Yes, I certainly am.

Q. Did that market price fluctuate during 1946?

A. None whatever.

Q. What were the market prices for herring of the quality in suit herein in 1946?

Mr. Wakefield: I object to that as not being the best evidence; the witness has not been shown to be qualified. I submit that the best evidence would be actual sales, Your Honor. He is [45] in the business. He must have sold herring.

The Court: The objection is sustained with leave to counsel asking the question to further qualify the witness to make answer to such a question.

Mr. Hamlin: Very well.

Q. (By Mr. Hamlin): Did you make other sales of salt herring in 1946 aside from the one you have mentioned for this shipment? A. Yes.

Q. Did you make any before August of 1946?

A. Yes.

Q. Can you refer us to any specific sales before August, 1946?

The Court: The one thing that ought to be inquired of any witness is whether or not he is informed as to what the market was at such and such a time and, where the witness is a party, you don't have to inquire for anything other than his present state of information.

(Testimony of Lee H. Wakefield.)

Q. (By Mr. Hamlin): Following out the court's suggestion, do you know now what the price of salt herring of the quality in suit herein was in August, 1946? A. Yes, I do. [46]

Q. How do you know?

A. From sales we made.

Q. What was your personal participation in such sales?

A. Well, my broker would wire me from Chicago as to what he had the herring sold for; that was the established price.

Q. Did you keep in contact with your broker while you were at the plant at Port Wakefield?

A. Oh, yes.

Q. How often would you contact him?

A. Oh, possibly every week.

Q. I will ask you specifically if you can tell us of any transaction sale in July, 1946, or early in August before this present shipment?

A. Yes. We have established sales right here on the dock in Seattle.

Q. Do you have a particular sale in mind?

A. Yes, I have.

Q. What was the date of that sale?

A. It was a sale to A. Bundsen on August 9th.

Q. Of what year? A. Of 1946.

Q. What did you sell him?

A. It consisted of 180 half barrels medium at \$21 each, "X" dock Seattle. [47]

Q. Are there any other sales to which you can refer us prior to this shipment?

(Testimony of Lee H. Wakefield.)

A. I believe I have some more here. I believe that is the only record of sale that I have here prior to the time these fish came down.

Q. Were the fish involved in the Bundsen sale of the same type and quality as those involved in the shipment in question here? A. Yes.

Q. Have you any sales subsequent to the sale involved in this shipment in 1946?

A. Yes, I have.

Q. Will you refer us to any particular one?

A. I have one other sale here made to A. Bundsen in October,—October 29th, 1946, consisting of 211 half-barrels medium salt herring at \$21; 62 barrels large salt herring at \$23.

Q. Have you any other sales there subsequent to this shipment?

A. I have some sales here of damaged herring. I believe that is all that I have of record here.

Oh, I have one here, December 21st to Max Bortz of 6528 Orange Street, Los Angeles, California; 200 half-barrels medium at \$21.

The Court: \$21 per half barrel? [48]

The Witness: Per half barrel.

The Court: What would that be a barrel?

The Witness: Barrels at that time were \$40. Two half barrels usually brought a little more than one full barrel.

Q. (By Mr. Hamlin): Was that sold "X" dock or FOB car?

A. That was FOB car.

Q. Was that herring of the same quality and type as that involved in this action?

(Testimony of Lee H. Wakefield.)

A. Yes, it was.

Q. Did you have other sales in the fall of 1946 subsequent to the date of this shipment—I don't mean specific ones—but did you make other sales during that period?

A. Yes. We had other sales during the fall.

Q. Did you participate in them personally?

A. Those sales were made by my broker in Chicago, all of them, and handled by him.

Q. Who acted for Apex in dealing with the broker?

A. James Farrell & Company here acted as agents for P. V. Bright & Company of Chicago for the purpose of loading out the herring.

Q. Was there any change in prices at any time during [49] 1946? A. No, there was not.

Mr. Hamlin: I renew my question to the witness, asking him to state the fair market value of—

The Court: You might first, before you do that, ask him if he now knows what the fair cash market value of this product was at such and such a time and such and such a place.

Q. (By Mr. Hamlin): Mr. Wakefield, do you now know the fair cash market value of salt herring in half-barrels, medium and large, and in quarter barrels at Seattle, Washington "X" dock on September 4th, 1946; do you know what those fair market values were? A. Yes, I do.

Q. Will you state what they were for the three classifications of salt herring indicated?

(Testimony of Lee H. Wakefield.)

A. The quarter-barrels were \$13.00; the half-barrels medium \$21; and the half-barrels large, \$23.00.

The Court: That means half barrels containing large herring, is that what you mean?

The Witness: Yes, that is true; it is the size of the herring we are referring to when we say [50] medium or large. The size of the parcel is the same in all cases.

The Court: The one quarter barrel refers to what type of herring?

The Witness: Those were medium in the quarter barrels.

Q. (By Mr. Hamlin): Did you have sales pending for this entire shipment at the prices you have stated? A. Yes, sir; we did have.

Q. When did you return to Seattle in 1946 in the fall?

A. As I recall, it was the latter part of October.

Q. Was any of the shipment of 1358 barrels still in Seattle at that time? A. It was all here.

Q. Did you examine it? A. Yes, I did.

Q. Where did you examine it? A. Where?

Q. Yes, sir. A. On Bell Street Terminal.

Q. At any other place?

A. Some of it was in cold storage at Bell Street Terminal.

Q. Will you describe the condition of those portions or [51] all of the shipment which you examined? A. I didn't catch the question.

Q. Will you describe the condition of the shipment which you examined?

(Testimony of Lee H. Wakefield.)

Mr. Wakefield: I object to that, if the Court please, as being incompetent, irrelevant, and immaterial. He states that he examined it in October and it was discharged from the vessel in early September. I think without knowing all of the details as to where it was kept and under what conditions, between the time it left the ship and when he saw it a month or more later that it would be incompetent testimony to show the condition. I don't know what they did with it between the time it was taken out of the ship and when he saw it. Many things may have happened to it. I don't think it is proper.

The Court: Do you propose as a condition to your right to ask this question to connect up its condition when it started from the ship?

Mr. Hamlin: I do but I cannot do it by this witness. I must use people who saw it at the time it left the ship.

The Court: Upon the condition that the conditions at two different times are established to [52] be the same, the court will overrule this objection, subject to the condition that if he fails to supply that proof the court will upon motion strike it.

Mr. Hamlin: Will you read the question, Mr. Reporter?

(Last question repeated by the reporter as follows:

“Question: Will you describe the condition of the shipment which you examined?”)

A. Describe where or the condition of?

(Testimony of Lee H. Wakefield.)

(Last question repeated again by the reporter.)

A. The condition of the herring,—it was more than half of the herring still on the dock, in the open dock that had been culled and nothing but soup, you might say. It was disintegrated and absolutely spoiled. Then there was a portion that was in the cold storage which I examined and found in just fair condition. It was not prime. It showed the presence of more or less heat and the herring was quite soft.

Q. (By Mr. Hamlin): Was any of that shipment in good [53] condition?

A. No, not one barrel in first-class condition.

Q. Did you personally have anything to do with disposing of the shipment after your arrival in Seattle?

A. Yes; I had the entire sale or handling of the portions that were in question that might be usable.

Q. What was done with the herring?

A. Out of the lot that had been salvaged I succeeded in selling to the Independent Fish Company of Winnipeg, Canada, four hundred ninety-six half-barrels medium at 75 per cent of the then face value for good herring which was \$15.75 per half-barrel. Then there was some that was considered that they might possibly use, which they offered me \$8 a half-barrel for, which I accepted.

There are forty-eight half barrels medium of that at \$8.

(Testimony of Lee H. Wakefield.)

There was twenty-two quarter barrels out of that lot that they offered \$5 for, which I accepted.

The Court: What were the quarter-barrels left that you mentioned?

The Witness: The quarter barrels at \$5.00 each.

The Court: How many were there then?

The Witness: Twenty-two. [54]

A. (Continuing): That made a total to that one party of \$8,306.

The Court: That you realized from the sale of the——

The Witness: From the sale of the damaged stuff.

Q. (By Mr. Hamlin): You sold some more, too, didn't you?

A. Yes. There was a few left I sold to Max Bortz in Los Angeles.

Q. (By Mr. Hamlin): I think it is a matter agreed between counsel by exchanges of information that the total amount you realized was \$10,329, was it not?

A. Something like that I believe.

Mr. Hamlin: I then offer in evidence Libelant's request for admissions number 10 reading:

“That the balance of said shipment referred to in the amended libel herein at the time of its discharge from the Denali at Seattle, Washington, after deduction of the 632 barrels mentioned in request number nine, had no salvage [55] or other value whatsoever, save and except the following:

(Testimony of Lee H. Wakefield.)

596 half barrels medium at \$15.75 each,—\$9,387; 21 half barrels large at \$8.00 each,—\$168; 79 half barrels medium at \$8.00 each,—\$632; 22 quarter barrels medium at \$5.00 each, \$110; 8 quarter barrels medium at \$4.00 each,—\$32; total salvage, \$10,329."

The Answer of Respondent is as follows:

"Respondents are advised in the survey report of Alexander Gow, Inc., above referred to, that the sum of \$10,329 salvage was realized by the owner of the cargo in question by sale to the highest bidder."

Q. (By Mr. Hamlin): Mr. Wakefield, would this cargo of 1358 barrels of herring have normally incurred any cold storage or inspection expense if the buyers had accepted it and the sales had gone through?

A. No, it never would have been put in cold storage.

Q. Why?

A. Well, because the buyers were waiting here anxiously to have it loaded in cars and ship it.

Q. Do you know of your own knowledge whether or not there is a Weather Station at Kodiak?

A. There is one there I think; I am not positive about [56] that.

Q. How far is Kodiak from Port Wakefield?

A. I would say it is 28 to 30 miles on an air line. It is about thirty-five miles the way we go on a boat.

(Testimony of Lee H. Wakefield.)

Q. How often did you go to Kodiak during the summer of 1946? A. Usually once a week.

Q. How did the weather conditions compare between Port Wakefield and Kodiak in 1946?

A. Practically the same at all times.

Q. In thinking back over the period when this shipment was in your possession at Port Wakefield, Alaska, I ask you whether or not it was ever subjected to any extremes of temperature?

A. No, none whatever.

Q. Were the conditions of temperature to which it was subjected ever materially different from those to which your prior shipments in 1946 and prior years were subjected?

A. No, it was not materially different.

Mr. Hamlin: You may inquire. [57]

Cross-Examination

By Mr. Wakefield:

Q. Mr. Wakefield, with respect to the characteristics of the plant, the cannery, you don't have a separate warehouse, do you; it is part of the plant where you store the barrels of herring?

A. Yes, that is right.

Q. That is, it is right in with the rest of your operation?

A. Well, no. The herring department is out in the front end of the plant, where the other part is way in on shore.

Q. But you don't have a separate warehouse for storage purposes?

A. No. No, never have had.

(Testimony of Lee H. Wakefield.)

Q. And these barrels, after they are first packed, are stored where? A. In the warehouse.

Q. You have told in your testimony about opening them and re-brining and 20 per cent shrinkage and so forth. During the time from the time they are first packed until you reopen them, where do you keep them?

A. In the warehouse,—in the saltery part of the main [58] building.

Q. Then when you reopen them, you unpile them, do you? A. Yes.

They are taken down and stood on end and the end of the barrel taken out. And after we repack, of course, we lose 20 per cent; then we pile them back where we had them stowed before while they are curing.

Q. In what part of this herring plant are the barrels stored?

A. They are stored in the outside one hundred feet of the warehouse; well, it is about one hundred forty feet, to be exact.

Q. That is on the water side?

A. On the north part of the plant; the water side.

Q. In processing herring, is there a difference between mild cure and heavy cure?

A. Well, yes; sure, there is a difference.

Q. What kind of herring do you process?

A. We process what is called the Scotch cure.

Q. And that means a mild cure, doesn't it?

A. Well, just fairly mild,—not so very mild.

(Testimony of Lee H. Wakefield.)

What is called a hard cure, of course, is referred to as the Norwegian cure.

Q. What is the difference, if any, in your experience [59] between herring which is mild cured and that which is hard cured as to its keeping qualities?

A. Well, of course, herring that is hard cured will keep almost in any kind of climate, where mild-cured herring has to be kept fairly cool.

Q. Isn't it a fact, Mr. Wakefield, that the keeping qualities or the holding quality of salt herring has a direct relation to the amount of cure you give it?

A. The amount of salt you give it.

Q. Well, salt cure?

A. Yes, the salt in the cure, yes.

Q. In other words, the milder the cure, the more delicate and perishable the commodity, isn't that correct?

A. Yes, that is right.

Q. What is your principal market for mild cure salt herring?

A. The Jewish trade.

Q. From your experience, what type of herring do the Jewish trade demand or ask for?

A. Well, they ask for practically all the Scotch cure,—what we term the regular Scotch cure.

Q. Isn't it a fact, Mr. Wakefield, that one of your principal problems in the herring business is to get a herring as mild cured as possible for the Jewish [60] trade and which will also hold up,—get a balance between the cure and the demand of the market, isn't that your problem?

A. No, that is not.

(Testimony of Lee H. Wakefield.)

Q. You mean that these buyers that inspect the herring when it arrives here aren't interested in the amount of cure that it has?

A. Oh, they examine to see what the cure is. But they do not demand an extremely mild cure.

Q. What kind of cure was this herring that you put up in 1946?

A. It would be termed a firm Scotch cure.

Q. By Scotch cure you mean mild cure, don't you?

A. Yes, you might call it mild. It is a firm mild cure, if you want to put it that way.

Q. But it is a fact that the more salt you put in, the more lasting will be the keeping qualities of the product?

A. Not necessarily so. As long as it is thoroughly cured as a mild cure, it will keep indefinitely in mild temperatures.

Q. Well, I am not talking about mild temperatures. I am talking about the relation between the cure and a given temperature; let's say 70 degrees. Take two barrels of herring at 70 degrees, the mild-cured [61] herring will not stand up as long as the heavier cured, will it? A. No.

Q. How do you determine what degree of cure you are giving the herring when you pack it?

A. By testing the brine on the fish when we repack.

Q. How do you test the brine?

A. With a salometer.

Q. Does that show the percentage of salt?

(Testimony of Lee H. Wakefield.)

A. Yes, it does.

Q. What percentage did this herring in question in this case have?

A. When it was opened for repacking it ran about 85 per cent strength of brine.

Q. 85 per cent? A. Yes.

Q. What was it by the time it was shipped?

A. It ran between 85 per cent and 90 per cent when it was cured, ready for shipping.

Q. Isn't it a fact that the herring does not take any more cure after it is first brined,—when it is first salted I mean you get your maximum absorption, don't you, right there within the first thirty-six or forty-eight hours?

A. No, sir; that is not true. [62]

Q. Do you mean that it keeps on curing all the time?

A. It takes about ten days at least to be absolutely thoroughly cured. It runs from seven to twelve days, depending on the size of the fish and the fatness of the fish.

Q. Then after you have reached this condition of cure, as you call it, it doesn't take on any more cure after that, does it?

A. If you put in a stronger pickle it would pick up just a little bit of it.

Q. How much would it pick up?

A. Well, very slightly. If it is 85 per cent when we open it and we add 5 per cent more to that brine to refill, naturally, it would pick up maybe 1 per cent or 2 per cent by the time it got to the market.

(Testimony of Lee H. Wakefield.)

Q. Mr. Wakefield, isn't it a fact that 85 per cent is a very mild cured fish? A. No, it is not.

Q. How mild is it possible to have it, in your opinion?

A. You could have it down to 75.

Q. Did you ever pack any herring at 70 per cent?

A. 70? No, I don't think I have ever packed any at 70. I think I have packed some at 75 many years ago. [63]

Q. After the ten days of curing and you open the barrels and repack them, I understand that consists of two things; first, you put in more fish to take care of the shrinkage and, secondly, you put in additional brine, is that correct?

A. That is right.

First of all, we let off half the brine in the barrel so that the fish will settle down, and enable us to put in about 20 per cent additional fish. That fills the barrel up and then it is topped and re-brined with whatever brine it will take so that it is absolutely full when the bung is put in, ready for shipment.

Q. And that is what you mean by ready for shipment, after this has been done?

A. Repacking. They use the word repacking, but refilling is what it really is.

Q. And that is usually about ten days after it is originally packed? A. Yes.

The Court: Where do you get the herring for that refilling job?

(Testimony of Lee H. Wakefield.)

The Witness: We take from the same day's packing and dump part of those barrels. We dump one out of every five and use the fish out of those [64] barrels to fill up the others, from the same day's cure.

The Court: It results in a depletion of the over-all number of barrels that you started out with, is that right?

The Witness: Yes. You see, that accounts for the over-all quantity being about 20 per cent more than the repacked amount.

Q. (By Mr. Wakefield): After the repacking, where do you store your barrels of herring?

A. We store them,—we start in out in the outer end of the warehouse, fill that up. As we repack, we fill that up as we come back into the warehouse.

Q. How are they stored, on the ends or the bottoms or sides?

A. They are stored on their sides and tiered up three barrels high, lying on the bilge of the barrels, stowed on the bilge of the barrels.

Q. Can you tell us why you store them on their sides instead of the ends?

A. There is no particular reason why except that if you store them on the end it is a whole lot harder to stow. You don't get the same number in the same space. [65]

The Court: What about the ease with which you may thereafter examine the contents of the barrel?

The Witness: That is easy enough. We take

(Testimony of Lee H. Wakefield.)

them right down off of the pile and open them up and check them.

The Court: I mean the manner of stowage—whether it is laid up endwise or flatwise.

The Witness: That doesn't make a bit of difference.

The Court: You can get the bung out of the barrel just as well whether the barrels are on end or on their side?

The Witness: No. We have to up-end them if you want to check them after they are ready for shipment.

The Court: Proceed.

Q. (By Mr. Wakefield): When do you do this checking after they have been repacked and stowed in the warehouse; what do you recheck them for?

A. We never do that.

Q. Oh, you don't recheck them?

A. No, we don't recheck after that.

Q. I didn't think so. You said something this morning about inspecting the fish and you mentioned to see [66] if there was any feed in them.

Will you tell the Court what you mean by feed in the fish?

A. Yes. There are certain types of feed, what they call black feed, which is a kind of a little muscle shell or something of the kind. Whenever the herring have that we don't pack any of them because it has a tendency to burn the fish.

Q. It causes a fermentation, doesn't it?

A. Well, yes; you might say a fermentation.

(Testimony of Lee H. Wakefield.)

Q. That is one of your constant problems is to get herring or avoid herring that have feed in them?

A. No, that is not. It is very seldom that we get any that has the black feed. Any other kind of feed doesn't matter. It is only the black feed.

Q. Wasn't there a time, Mr. Wakefield, when the law permitted you to confine the herring days and convenient places so that they wouldn't feed and then they changed that so that you can't do that now and you have more feed than you used to have, isn't that a fact?

A. Oh, yes. In the early days when we were not using a meal plant we did have what we call "pounds." We would catch the fish and put them in a set pound; not so much about the feed as it was to hold a [67] quantity of fish while the run was on.

Q. In shipping herring, did you ship all of your herring in 1946 by Alaska Steamship Company boats?

A. No. I think we brought down part of it. In the last of the season we always bring some down with our fishing boats. They always want a couple of three hundred barrels for ballast, coming across the Gulf. So we always bring some down in the fishing boats at the end of the season.

Q. But your commercial boats were all with Alaska Steam?

A. They were all with Alaska Steamship Company.

Q. What is the practice you have followed at

(Testimony of Lee H. Wakefield.)

your plant with respect to how frequently you make shipments?

A. Well, we would make shipments as frequently as we could as long as we had a carload ready. We usually would always ship at least one carload at a time. Otherwise, if we didn't have a carload it would get down here and you wouldn't be able to ship it. You would have to stow it until you got sufficient to make a carload.

Q. Let's put it this way: During a normal season, how many commercial shipments will you make from your Port Wakefield plant? [68]

A. Oh, possibly six or eight shipments; five or six shipments. I wouldn't recall exactly the number we were making during the season.

Q. I was wondering whether you waited until you had any certain quantity before you shipped or how do you gauge it?

A. Well, we didn't, except as I explained. If we didn't have a carload we usually held until we got enough for a carload. Four hundred half-barrels is a carload.

Q. Four hundred half-barrels? A. Yes.

Q. On this particular summer, or in this particular season in 1946 when had you made a shipment from Port Wakefield prior to the one on the Denali which was involved in this suit?

A. We had some shipped prior to that, yes.

Q. I say when was that?

A. Either the last of July or about the first of August, somewhere along in there.

(Testimony of Lee H. Wakefield.)

Q. And this shipment on the Denali was made on August 23rd, is that right?

A. I think that is the date that they were loaded.

Q. Did you have any shipments prior to the one you say was the last of July or the first of August?

A. I think not. I don't recall now but I think not.

Q. What shipments did you have after the Denali on August 23rd?

A. Oh, we had several shipments after that.

Q. Up until how late?

A. About the 15th of October.

Q. Would the shipments all average around one thousand to fifteen hundred barrels each shipment?

A. No. Sometimes there would only be six or eight hundred,—five hundred or six hundred, depending on what was ready when the steamer came.

Q. Are you advised, Mr. Wakefield, in advance as to the date the vessel will arrive?

A. Yes, we are.

Q. How do you get that information?

A. Through the agent in Kodiak by wireless. We have a wireless station there and communicate with the agents in Kodiak. They inform us when to expect the steamer.

Q. I understand that in this instance of the shipment on the Denali, that some five or six days before the Denali arrived you put about four hundred barrels out on the dock?

A. Something like that, yes.

(Testimony of Lee H. Wakefield.)

Q. And you say that was to facilitate the loading of the [70] ship? A. That is right.

Q. How does that facilitate the loading?

A. When the ship lands, if we have got three hundred or four hundred barrels right next to the fling, when they start loading, why, we only have to have two men there to break down; whereas, if we have them piled 'way back in the warehouse, we have got to have three or four men to roll them out, to keep the fling going. So by having them out on the dock, some of them, why, it enables us to get them out that much quicker,—get the ship out that much quicker.

Q. But the nine hundred odd cases that you still had inside had to be brought out, did they not?

A. Yes. Well, some of those are just inside the door. The pile always starts right against the wall inside the door.

Q. Did I understand you to say that these barrels that were placed out on the dock five or six days before the vessel arrived were covered up with something?

A. They were covered with salt sacks and tarpaulins. We used salt sacks almost altogether because a salt sack is double and, of course, when it is wet it holds the coolness longer than a piece of canvas would. [71]

Q. How were they stowed out on the dock, on their sides or ends?

A. On their sides, yes,—on the dock.

(Testimony of Lee H. Wakefield.)

Q. Did you cover them yourselves?

A. I had the saltery crew cover them.

Q. Did you see it?

A. Yes, sir; I certainly did.

Q. Did I understand you to say also they were kept wet?

A. Yes, whenever there was any heat at all in the daytime we would go out and hose them over once in awhile. As a matter of fact, I used to do it very frequently myself.

Q. You used a hose?

A. Yes,—turned a hose on them. We had all kinds of water right there handy.

Q. Were they so covered as you described it when the ship arrived?

A. No. We always uncover them when we know the ship is coming in and get them ready to start loading.

Q. On this occasion, how long before the ship arrived were they uncovered?

A. They were uncovered that forenoon. I think the ship arrived about noon.

Q. Mr. Wakefield, from your long experience in Alaska, [72] those ships don't arrive on a definite hour or two hours or four hours, do they?

A. Well, yes; they arrive very close to the time that we have been notified from Kodiak.

Q. And you uncovered them how long before the ship got there?

A. During the forenoon of the day that the ship was to be in.

(Testimony of Lee H. Wakefield.)

Q. When did the ship get there?

A. I think it was around 11:00 o'clock.

Q. At night or in the morning?

A. No, at noon; near the noon hour.

Q. Is that your present recollection that the ship got there around 11:00 o'clock just before noon?

A. Yes; that is my recollection anyhow, that it was near lunch time when they got there.

Q. In your testimony this morning, in explaining Exhibit 7 I think it is which is a list of dates and barrels packed, you referred to the dates of August 18th, 19th, 20th, 21st, 22nd and 23rd, which showed only seven barrels packed on the 20th and none on the other dates.

Did I understand you to say that during those five or six days that you were engaged in repacking the fish all of that time? [73]

A. Part of that time was utilized in repacking prior to the time the steamer came.

Q. You have also testified that this repacking must take place around ten days after it is first put up because that is when you get your cure. How could you wait and repack this whole lot five days before the ship arrived when some of it was put up thirty days before?

A. It doesn't matter if it cures longer than ten days. I said it took ten days ordinarily for it to take the 20 per cent shrinkage.

Q. What is the fact, do you repack it at the

(Testimony of Lee H. Wakefield.)

end of ten or twenty days, or do you wait thirty days?

A. If we are busy gibbing or the crew is busy packing fish we hold it over longer than that until we have a slack day, and then we go ahead and repack.

Q. Do you know of your own knowledge, or have you records that would indicate when you repacked these barrels of herring that are shown on Exhibit 7 starting with the date of July 24th, 225 barrels; in other words, when was that 225 barrels that was packed on July 24th repacked?

A. I can't tell you now offhand.

Q. When was the 102 barrels packed on the 25th repacked?

A. That I couldn't tell you. [74]

Q. You don't know when any of it was repacked?

A. I know that it was packed during that time from the 24th to the 10th of August; the amount of fish that were packed during that time were repacked some time starting in about the 5th of August; somewhere along in there we would start repacking the fish that was gibbed the 24th, 25th, and 26th of July. That would be about our first repacking—about the 4th or 5th of August, those first ones that were gibbed.

Q. And then you would do it as you go along and as you have time for it?

A. Yes, that is right.

(Testimony of Lee H. Wakefield.)

Q. Does the same crew that gibs or packs the herring originally repack it? A. Yes.

Q. Does it take as long to repack a barrel as it did to pack it originally? A. No.

Q. Half as long?

A. About half as long, maybe a little more.

Q. And you say that you had a daily capacity of about 300 half-barrels?

A. Gibbing, yes.

Q. So that you could repack in a day more than three [75] hundred in a day, could you?

A. Yes, we could.

Q. How many would you say you could repack in a day?

A. Oh, I would say we could repack at least four fifty if we worked the same length of time,—the same number of hours.

Q. This Exhibit 8 which is a picture of the cannery as you will recall, you put two red marks on there. I don't recall now what you said that represented.

A. Between those two lines I marked a cross there with a red pencil is where the herring was stored on the dock,—between the door and that big brine tank that was out there.

Q. And the balance of it that was inside the plant was behind that partition, is that correct?

A. Yes, that is correct—behind the outside wall there.

Q. Why was it necessary, in your opinion, Mr.

(Testimony of Lee H. Wakefield.)

Wakefield, to cover the barrels that were out on the dock and keep them wet; why did you do that?

A. Well, in the event that the sun might come out and be sufficiently warm to affect the herring.

Q. The sun does affect herring, does it?

A. Well, if it is hot enough it might; it would draw the oil; it will draw the oil on them if it is very hot. [76]

The Court: When are you speaking of now,—with reference to what stage of packing or non-packing of the herring in the salted condition in the barrels are you now speaking?

With reference to the time they are first put in the barrels as salt herring, of what time are you now speaking in answer to this sun damage?

The Witness: What I thought he was asking was those that we put on the dock waiting for the steamer, why, we cover them.

The Court: That is, those that are already in the barrels?

The Witness: Oh, yes, already cured,—thoroughly cured and repacked.

The Court: Proceed.

Q. (By Mr. Wakefield): What is the purpose of keeping them wet?

A. It is to keep the top tier of the barrels from getting warm from the sun.

Q. In other words, that is all to keep them cool?

A. To keep them cooler, yes; we try to keep them as cool as possible.

(Testimony of Lee H. Wakefield.)

Q. As a matter of fact, isn't it your practice to put the barrels out on the dock because of the limited [77] space that you have in your plant for barrels?

A. Not until we are expecting a steamer. We have lots of space for storage of the barrels inside.

Q. Don't you customarily put them out on the dock, though, regardless of the arrival of the steamer, just because of the space that you need?

A. Not as a rule we don't put anything out on the dock until just a few days prior to when we expect a steamer.

Q. You have said that you put these four hundred barrels out there five or six days before the steamer arrived and that that was done to facilitate loading.

Why didn't you wait until the day before the steamer arrived?

A. Well, because when we were repacking during those days, why, in order to save handling them twice we rolled them right out and piled them on the dock to have them ready for the steamer.

Q. Then that was to save handling them twice for your own convenience, wasn't it?

A. That is right.

Q. Did I understand you to say that the Denali customarily made a port landing at your dock?

A. No. It customarily made a starboard landing.

(Testimony of Lee H. Wakefield.)

Q. A starboard landing. I think from my notes you said [78] port but maybe I am mistaken.

A. On this particular trip she made a port landing.

Q. When she makes a starboard landing, what did you say about the loading into the hatches?

A. When she makes a starboard landing, it brings the bow end of the boat right up to the dock and the stern end lays up against a big dolphin. That puts Number 1 hatch right in front of where we load. That is the customary way she landed at our place.

Q. When she makes a port landing, what happened?

A. Then the bow would be up by the dolphin and that would throw Number 3 hatch right up the face of the dock.

Q. Did you say that this was the first time she had made a port landing?

A. No. I didn't say that was the first time she ever made one.

Q. Well, is it a fact that if it is a port landing, the herring goes into Number 3 and 4 lower holds and if it is a starboard landing the herring goes in Number 1 hold? A. That is right.

Q. Do you recall the voyage of the Denali prior to the voyage in question at your plant on August 23rd when [79] she was there in July of 1946 on voyage 54? A. No, I don't recall.

Q. So that you wouldn't say whether or not your herring was loaded in Number 3 at that time?

(Testimony of Lee H. Wakefield.)

A. Well, I wouldn't say because this particular trip is the only one that I recall up to that time that they had ever loaded in Number 3 hatch. I supposed that the ship's crew knew enough about handling herring in 25 years to know how to stow it so I didn't pay any attention to it.

Q. You don't deny that the previous trip the shipment of herring from the plant was in Number 3 hold?

A. No, I don't admit that there was anything prior to that. I think that the prior shipment was in Number 1 hold.

The Court: What date was the prior shipment, if you recall, Mr. Wakefield?

The Witness: Well, it would be along in the last part of July.

The Court: Was that on a preceding voyage?

The Witness: Preceding voyage.

Q. (By Mr. Wakefield): Were you on the dock and talking with the ship's officers at the time your herring was loaded on August 23rd? [80]

A. Yes.

Q. You knew which hatch it was going into, did you?

A. Yes. I could see where they were putting it.

Q. Did you go down into the hold?

A. No, I never did.

Q. As a matter of fact, what hatches did they put it into? A. Number 3.

Q. Just in Number 3?

(Testimony of Lee H. Wakefield.)

A. I think every bit of it went in Number 3 hatch. I know that is where it was going when I went aboard the ship.

Q. I would like to ask you a little further about this feeling of the fish to test the cure. Do you tell by the firmness, is that what you mean?

A. That is right.

Q. You mean the harder the cure, the firmer the fish, is that right?

A. The harder the cure, the firmer the fish would be, that is right.

Q. And that is at the time it is repacked?

A. Yes, sir.

Q. Does that firmness change any after that time?

A. No. It would stay practically the same, depending on whether you would put a stronger pickle in it [81] after repacking.

Q. Let's suppose that it is 85 per cent and you repack it at 85 per cent, is there the same degree of firmness?

A. That remains the same.

Q. It remains the same. So that the fish actually, as far as its curing qualities are concerned, is set, so to speak, at the end of about 10 days?

A. That is right.

Q. What would be the purpose, then, Mr. Wakefield, of putting in a stronger brine when you repack it if the fish is set before that time?

A. If the fish,—if we opened a barrel and it ran only 80 per cent, we would put a little stronger

(Testimony of Lee H. Wakefield.)

brine which would bring it up to about 85 per cent after it was through curing. It will continue to cure a little after that if you have a stronger pickle on it.

Q. Then it isn't set when you repack it, is it?

A. To all intents and purposes it is.

Q. In testifying as to the price of the fish you used is the expression "X" dock.

What do you mean by "X" dock?

A. Well, some of the buyers,—especially Mr. A. Bunzen would buy herring right on the dock. Then [82] he would probably ship some of it and the rest of it he would put in cold storage to take care of future sales. In that event, he would pay us for the herring as it laid right on the dock. In the case of cars going to Chicago or New York or any of those places, we paid for loading the herring into the car.

Q. That plus cold storage and handling charges?

A. That is right.

Q. Isn't there some difference in the price, whether it is "X" dock or FOB cars?

A. No, it wasn't that year; whenever herring is scarce you get practically what you want for it. You don't have to make any differentiation as between loading it in the car or selling it on the dock.

Q. Well, the expenses that you incur are different, are they not, whether it is "X" dock or FOB cars?

A. Well, of course, we have to pay the dockage, you know,—the longshoring, when it is sold

(Testimony of Lee H. Wakefield.)

on "X" dock. We pay for all the unloading and the inspecting.

Q. You have testified to sales made on different dates. I note here one in December and one October 29th. Where is that herring kept from the time it is discharged from the ship until you sell it?

A. That herring was probably herring we brought down [83] with our own boats, the last of the pack which was packed in the last part of September and the early part of October?

Q. That wouldn't be true of herring that you packed on the 21st of December, would it?

A. No, I wouldn't say it arrived on the 21st of December.

Q. What I am asking is where you keep it from the time it gets here and you sell it?

A. At the Bell Street Dock.

Q. Is that true of all shipments?

A. If it is the first part of October or the latter part of November or the early part of November it isn't necessary to put it in cold storage. It will remain there only a short time.

Q. What do you mean by a short time?

A. If it is going to be shipped we leave it right on the dock in the open fish place we have right there.

Q. Are you referring to two or three days or four days, something like that?

A. Well, yes, or sometimes a week. It wouldn't hurt, depending on the weather. If it were warm weather we would put it right in cold storage.

(Testimony of Lee H. Wakefield.)

Q. Do you gamble on what the weather is going to be? How do you know whether it is going to be warm or [84] cold weather?

A. I have lived in Seattle a long time and I know a good deal about the weather. When it is cold, rainy weather it isn't necessary to store herring in cold storage.

Q. Suppose you have got a lot of herring on the Bell Street Dock without being in cold storage and it suddenly gets warm, what do you do?

A. Put it in cold storage.

Q. This herring that came down on the Denali on this voyage 55, a portion of it as I understand was in cold storage on the Bell Street Dock, was it?

A. What had been segregated and considered salable at some kind of a price had been put in cold storage and was in the cold storage when I came down. Pete Wahl, the inspector, segregated and took out all that he thought might be salable and put it in cold storage.

Q. Do you know how many barrels that was?

A. I think we had it here a while ago. It was something over 500, I believe.

Q. Counsel says 632. Does that coincide with your——

Mr. Hamlin: Excuse me. 632 were given to the reduction company.

The Witness: That was the amount, I think, [85] that went to the meal plant.

Q. (By Mr. Wakefield): 726. Will you tell us whether those 726 barrels were sold and taken out of

(Testimony of Lee H. Wakefield.)

the cold storage? You gave us the prices but didn't tell us where you sold them.

A. The carload to Winnipeg was on November 9th, consisting of 496 medium, 48 half barrels—that is at \$15.75; 48 at \$8.22,—quarters at \$5. Those were loaded out on November 9th.

Q. Were the rest of them sold after that time?

A. Yes. The rest of that damaged lot was sold I think very soon afterward,—just a few days, if I am not mistaken.

Q. What was the reason, Mr. Wakefield, for holding that herring from the first of September until November 9th, to sell it?

A. The reason was that the best offer they had been able to get for their herring prior to the time of my arrival here was 60 per cent of the real price for good herring.

I figured that I might be able on account of the scarcity of herring to recover a little more by personally handling the deal myself, which I was able to do. I got 65 per cent instead of [86] 60 per cent. The best offer that had been made up to the time I came down was the 60 per cent.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Hamlin:

Q. Mr. Wakefield, in your experience in shipping herring from Alaska, have you ever requested cool room storage or cold storage for your herring on the voyage down from Alaska?

A. No, I never have.

(Testimony of Lee H. Wakefield.)

Q. You always shipped in just the ordinary hold of the ship?

A. In the ordinary hold of the ship, yes.

Mr. Hamlin: That is all. I have no further questions.

The Court: Is there any further examination to be made by respondent?

Mr. Wakefield: I think not, Your Honor.

Mr. Hamlin: That is all.

(Witness excused.) [87]

The Court: You may call your next witness.

Mr. Hamlin: Mr. William T. Ferry.

WILLIAM T. FERRY,
called as a witness by and on behalf of Libelant
having been first duly sworn was examined and
testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your name, please?

A. William T. Ferry.

Q. Where do you live, Mr. Ferry?

A. Here in Seattle.

Q. What is your occupation?

A. Meteorological Aid.

Q. Employed by whom?

A. United States Weather Bureau.

Mr. Hamlin: Counsel, I have here an exhibit which is a positive photostat of an original. As I understand, you do not object to it on the ground that it is not the original but upon other grounds, is that right?

(Testimony of William T. Ferry.)

Mr. Wakefield: That is correct. [88]

Mr. Hamlin: May I have this marked as an exhibit?

(Climatological Data marked Libelant's Exhibit 9 for identification.)

Q. (By Mr. Hamlin): Mr. Ferry, showing you what has been marked Libelant's Exhibit 9 for identification, can you tell us what it is, please?

A. It is a photostatic copy of the Climatological Data compiled by the Alaska Section, Alaska.

Q. Alaska Section of what?

A. Alaska Section of the United States Weather Bureau.

Q. Do you know whether these sheets are prepared by employees of the United States Government or not?

A. The data on these sheets are compiled in Anchorage and printed in Portland, Oregon?

Q. Is the compiling of this data a part of the regular duties of the employees of the Weather Bureau? A. Yes.

Mr. Hamlin: I then offer Libelant's Exhibit 9 in evidence.

Mr. Wakefield: If the Court please, I have this objection to the exhibit. On the first page there appear to be certain comments and opinions with respect to whether it was the warmest or driest [89] July and so forth and so forth. I think that part of the exhibit is incompetent, irrelevant and immaterial. It is hearsay. There is no one here to cross-examine on these conclusions. I don't ob-

(Testimony of William T. Ferry.)

ject to the actual figures of temperatures but I do object to the first page with respect to the opinions and comments. That is pure hearsay.

The Court: That might depend on who made them and when and for what purpose.

If they were made for the purposes of this trial, then what you say might be well taken. If they were made by some official in the Weather Bureau at the time he was performing his ordinary duties and in connection with the performance by him of his ordinary duties; if he had a duty to make this comment in his official or governmental position, then what you say would seem to the court not to be tenable.

Mr. Wakefield: Except for the fact that we have no opportunity to explain or find out what this means. I don't know anything about it.

The Court: Your noted exception would not affect admissibility.

Mr. Wakefield: I am only objecting to the hearsay conclusions and statements on it. [90]

The Court: Your objection, however, requires the court to not admit the exhibit until some further proof is offered respecting the matter objected to.

Q. (By Mr. Hamlin): Mr. Ferry, calling your attention specifically to the matter appearing on the first page of the exhibit, and also on the,—well, the similar page for the month of August, 1946—I ask you if that written material there,

(Testimony of William T. Ferry.)

those statements, if you know by whom those are prepared?

A. I don't know who prepared those. I know in our office who generally prepares them, but I can't say that I definitely know who prepared it.

Q. I don't think it is necessary for you to state the name of the person, but what class of persons prepares it?

A. The general summary in our office is usually compiled by the Climatologist.

The Court: Why are they compiled by him?

The Witness: Well, it is his duty to write off summaries of the data for the State.

Q. (By Mr. Hamlin): Do you know upon what factual basis these summaries are prepared? [91]

A. Well, he has got his facts in front of him.

Q. What are those facts?

A. The figures of these different stations.

Q. Are records kept of temperatures for past years by the Weather Bureau in the Alaska Section?

A. I don't believe I understand that question.

Q. Does the Alaska Section of the Weather Bureau keep records for years past?

A. That is right,—of the Alaska Section?

Q. Yes? A. Yes.

Q. Are those available to the persons making up this report? A. Yes.

Q. Do you know whether or not they use those records in preparing these reports?

(Testimony of William T. Ferry.)

A. To find out their deviations from normal, they must. And to compile their normals they would have to use the records.

Q. Do these general summaries serve any purpose in the functioning and operation of the Weather Bureau; do you use that information for anything or is it just conversational?

A. It is taken from random through what occurred during the month and made a summary of. Does that answer [92] your question?

The Court: No. I believe counsel is trying to get to this point. Did the fellow who put that comment on that record do so as a part of his own entertainment or frolic of his own, or did he do it in pursuance of some official employment duty?

The Witness: He did it in the capacity of his job.

The Court: Is it required of him to make some comment like that?

The Witness: As far as I know, that is the standard operating procedure throughout the United States.

The Court: That the person who makes up that record has to put on that observation data?

The Witness: That general summary,—that writes the general summary.

Q. (By Mr. Hamlin): Is the same true of the remarks by observers, the temperature and the precipitation headings below that?

A. In our office we have a temperature summary and we have a precipitation summary, but as long

(Testimony of William T. Ferry.)

as I have ever worked there we have not had remarks by observers. [93]

Mr. Hamlin: I renew the offer at this time.

Mr. Wakefield: I make the same objection to the comments on the first page.

The Court: The objection is overruled for the reason that the court finds from this witness' testimony that that comment was placed on there in pursuance and performance by the person who put it on there of regular routine duty.

Mr. Hamlin: I wish to call the court's attention to a portion of this exhibit. It appears on the first page at the bottom of the right-hand column. There is no number on that first sheet but the succeeding pages are numbered commencing with "38" and running through to "42" and then there is no number, and then "44" picks up and goes on. But the thing I want to point out to the court is the small print at the bottom reading "The Southern Division consists of the southeastern,"——

The Court: Note 1, is it?

Mr. Hamlin: Yes, sir, Note 1.

The Court: You may proceed. I have that [94] identified.

Mr. Hamlin: "The Southern Division consists of the Southeastern, Pacific Coast, and Southwestern Islands Districts; the Northern Division consists of the remainder of the Territory."

Then under the General Summary, at the top left column,

"July, 1946, was a cool, rainy month in the Southern Division. It was the second consecutive

(Testimony of William T. Ferry.)

July that was cooler and wetter than usual in Southeastern Alaska.”

Then jumping over to the next similar page there is a similar comment about August, 1946, stating,

“August, 1946, was one of the coolest on record for Alaska.”

The Court: I don't see that.

Mr. Hamlin: That is following page 42, Your Honor. It is the next one with the heading on it “Climatological Data.” [95]

Mr. Wakefield: I didn't see that either, if the Court please, and in view of it appearing in here, I want to include that page in my objection also.

I don't know how to refer to it except that the following page is numbered 44 in the exhibit.

The Court: Is it something that has “number 8” as a part of the reference,—“Vol. XXXII”—Anchorage, Alaska, July, 1946, No. 8”?

Mr. Hamlin: Yes, sir.

The Court: Is that the page?

Mr. Hamlin: Yes, Your Honor.

The Court: Where is the word “August”—at the beginning of the General Summary?

Mr. Hamlin: Yes, sir.

The Court: Is that the paragraph or the first line of the paragraph you wish to call attention to?

Mr. Hamlin: Yes,—“August.”

The Court: The objection is overruled. The exhibit will be admitted for the purposes of this “No.

(Testimony of William T. Ferry.)

8" the same as "Number 7" the one that concerned the July summary.

Is there anything else now? [96]

Mr. Hamlin: Yes, Your Honor. I think this witness may be helpful in explaining some of the tables on the interior of this, if he may have the exhibit back.

Q. (By Mr. Hamlin): Mr. Ferry, calling your attention to the first page of Exhibit 9, the one that is headed "Vol. XXXII, Anchorage, Alaska, July, 1946, No. 7," I notice two tables in the right-hand column. What does that first table headed "Comparative Extremes for July, 1946," mean?

A. Just what it says,—Comparative Extremes. The highest and lowest,—the greatest amount of precipitation and the least amount of precipitation.

Q. Calling attention to the second item, "Pacific Coast," I notice in the first column the figure "84."

What does that mean?

A. That was the highest temperature recorded.

Q. And the next column has the figure "88."

What does that mean?

A. That means for previous years.

Q. 88 was the highest?

A. Yes; the highest recorded in previous years.

Q. And the same is true of the column headed "Lowest" [97] is it?

A. Yes; it is the lowest recorded this year and the lowest recorded in previous years.

(Testimony of William T. Ferry.)

Q. Is it true that the next table below is a comparison of data by years, commencing with 1907 and continuing through 1946 of mean temperatures, average precipitation and snowfall in the Southern Division and in the Northern Division?

A. By divisions, yes.

Q. Now, turn to page 38, please.

I see a large table there. If you can locate the weather station Kodiak, going across the columns, the first two columns, give the latitude and the longitude of the station, is that correct?

A. That is right.

Q. Then there is the elevation of the station. Is that the place where the actual temperature readings are taken at 21 feet elevation?

A. That is the approximate elevation of the Station.

Q. Under the column headed "Departure from the normal" I note the figures "minus 0.1." What does that mean?

A. In other words, the mean of 55.2 is a minus 0.1 below the normal; in other words, the normal for the month of July is 54.3. [98]

Q. Does that mean that this July, then, was colder or warmer than ordinary?

A. It was cooler than normal.

The Court: At this point those connected with this case are excused for at least ten minutes and may retire if they wish to do so.

(Recess.)

The Court: You may proceed.

(Testimony of William T. Ferry.)

(Monthly Meteorological Summary marked Libelant's Exhibit 10 for identification.)

Q. (By Mr. Hamlin): Referring to Libelant's Exhibit 10, will you tell us what that is, please?

A. It is a monthly meteorological report for the City of Seattle in conjunction with the Air Port.

Q. For what month?

A. September, 1946.

Q. By whom is this document prepared?

A. It is prepared by the City Office.

Mr. Wakefield: I have no objection to this, Your Honor.

Mr. Hamlin: I offer Exhibit 10. [99]

The Court: Admitted.

(Libelant's Exhibit 10 received in evidence.)

The Court: What year does this concern?

Mr. Hamlin: September, 1946, Your Honor.

Q. (By Mr. Hamlin): Mr. Ferry, I notice that on the table on the front of Exhibit 10, it has a heading "City Center."

Can you tell us where the readings for that City Center temperature are taken?

A. The thermometers are on the south wing of the Federal Office Building.

The Court: At what street in the city of Seattle?

The Witness: At First and Marion.

Mr. Hamlin: You may inquire.

(Testimony of William T. Ferry.)

Cross-Examination

By Mr. Wakefield:

Q. Referring to the last exhibit, Libelant's Exhibit, Libelant's Exhibit Number 10, I see a column under both "City Center," and "Airport" which says "Departure from Normal." Does that mean the degree [100] of heat above and below normal? Let's take the September one, City Center Departure from Normal, it says, "Plus one." What does that mean?

A. That is the deviation from normal; that plus 1 on the Airport is the deviation from normal.

The Court: In which direction does it deviate; is it more cold or hot?

The Witness: The month of September was one degree warmer than normal.

Mr. Wakefield: I have no further questions.

Mr. Hamlin: I have no further questions. May this witness be excused from further attendance?

The Court: Is there any objection?

Mr. Wakefield: No, Your Honor, no objection.

The Court: You may be permanently excused from attending this trial as a witness.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamlin: Call Mr. Floyd Ellis. [101]

FLOYD E. ELLIS,

called as a witness by and on behalf of the Libellant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. Floyd E. Ellis.

Q. Where do you live, Mr. Ellis?

A. In Seattle.

Q. What is your occupation?

A. I am a partner in the firm of James Farrell & Company.

Q. What is the business of James Farrell & Company?

A. It is primarily that of fish oil and fish meal brokerage and sales agent.

Q. Did you have any arrangement with the Apex Fish Company about the marketing of their salt herring in 1946?

A. We did, yes.

Q. Did you have any arrangements with them about the marketing of meal and oil produced by that plant?

A. We did.

Q. What was that arrangement? [102]

A. In the case of the meal and oil we act as their sales agent and sell it.

The Court: He asked you a specific question in reference to a specific time or season. What did you do on that occasion respecting that season?

Read the preceding question and the last question, Mr. Reporter.

(Testimony of Floyd E. Ellis.)

(Last preceding question and answer together with last question repeated by the reporter.)

A. We sold it.

The Court: Your answer might mean that you sometimes do or might sometimes in the future.

The Witness: We are their exclusive agent for selling fish oil and meal. We sold all of their fish and meal during the season 1946.

You asked about the herring, didn't you?

The Court: Counsel will ask any further extension of the witness' answer that is desired.

Q. (By Mr. Hamlin): Referring specifically to 1946, did you have any arrangement with them about the marketing of their salt herring and, if so, what was it?

A. We acted as their fiscal agents here to handle the [103] details of shipment.

Q. Was that arrangement oral or in writing?

A. Oral.

Q. It has been testified that the 1358 barrels of salt herring in suit herein were shipped to James Farrell & Company and the exhibit so states.

Will you state why that was shipped to your order?

A. That was shipped to our order so we could have control of the herring upon its arrival in Seattle, handle the shipping details and, if necessary, draw the drafts and make the arrangements in accordance with the instructions of the broker that sold it.

(Testimony of Floyd E. Ellis.)

Q. Did you have any interest in this shipment at all? A. None at all.

Q. When I say "you" I mean the firm of James Farrell & Company.

A. No; neither the firm nor myself.

Q. Did you receive any notice from Mr. Wakefield that this particular shipment had left Port Wakefield? A. Yes, we did.

Q. What did you do upon learning that it was on the way?

A. We immediately wired his broker, P. V. Bright & Company at Chicago advising them. [104]

(Day letter and Air Mail letter marked Libelant's Exhibit 11 for identification.)

Q. Showing you what has been marked Libelant's Exhibit Number 11, I ask you what it is, please?

A. This is a telegram sent by our office to P. V. Bright & Company, on August 26th.

Q. Is that the actual telegram or a copy thereof?

A. This is the actual telegram, sent over our teletype machine.

Q. From where did you get that document which has been marked Libelant's Exhibit 11?

A. Out of the office files of James Farrell & Company.

Q. Is that part of your own records?

A. That is part of my own records.

Mr. Hamlin: I offer Libelant's Exhibit 11 for identification in evidence.

Mr. Wakefield: It is objected to as irrelevant and incompetent. I looked at it, Your Honor. It

(Testimony of Floyd E. Ellis.)

just seems to be some correspondence about selling this shipment. They have already testified as to market value. I don't see any possible relevancy to this exhibit. It just clutters up the record.

Mr. Hamlin: If the Court please, this exhibit and the next one are offered for the sole [105] purpose of showing that the shipment was sold on approval of the buyers and was destined to move directly through Seattle without the necessity of incurring any storage charges here. It is the theory of the libelant that the storage charges and the inspection charges would not have been incurred had the shipment not been damaged in transit. That is why we would like to show that it was going to move right on through.

The Court: Have all of the objections been stated?

Mr. Wakefield: On the basis of counsel's explanation, it is further objected to as incompetent and irrelevant because of the fact that it is purely conjectural as to what would have occurred. This is seeking to prove by a letter that had the shipment arrived such and such might have been done.

It is hearsay, also, and objected to on that ground.

The Court: The objection is overruled. Libelant's Exhibit 11 is admitted.

Mr. Wakefield: The letter, Your Honor, is a letter from a person not here in court.

The Court: I have heard the testimony relating to it. The ruling will stand. [106]

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 11 was received in evidence.)

The Court: Let Mr. Wakefield see the part that was thought to have been marked Exhibit 12.

Mr. Wakefield: That was the basis of my objection,—a letter from P. V. Bright & Company to James Farrell & Company, dated August 28th, 1946. It is purely hearsay, Your Honor.

The Court: Are you content to leave them attached together as Exhibit 11 instead of separating them?

Mr. Hamlin: Yes, that is perfectly all right.

The Court: Are you content to rest the admissibility on the same principle,—that is another thing.

Mr. Hamlin: Yes, sir. They constitute an offer and acceptance.

The Court: I understand the witness' statement that these are business records of his concern, James Farrell & Company, made in the course of business at the time that the transactions were occurring. Is that the effect,—do both sides understand that to be the effect of this witness' testimony concerning this exhibit?

Mr. Hamlin: I don't think he has said [107] so as to the letter.

The Court: Then before the court rules I would like further to know about that point.

Q. (By Mr. Hamlin): Mr. Ellis, I note that Exhibit Number 11 consists of a copy of a telegram and a letter. Will you tell us where the letter por-

(Testimony of Floyd E. Ellis.)

tion of that exhibit came from; from where did you produce it in court today?

A. That is out of the files of James Farrell & Company.

Q. Is that a part of your record of this transaction? A. It is.

The Court: When was that part of it acquired by your company,—the letter part of that exhibit?

The Witness: It came air mail, I would say, about August 30th—the way air mail travels. This was sent August 28th from Chicago.

Mr. Hamlin: That is all the identification I had in mind.

The Court: Does Mr. Wakefield wish to note any further objection or ask any questions of the witness?

Q. (By Mr. Wakefield): Mr. Ellis, I notice a lot of additions or changes [108] in ink on that letter. Who made those?

A. They were made by Mr. Starkel of P. V. Bright & Company.

Q. They were on there when you received it?

A. That is right; the ones in ink were. This note "Benjamin Franklin," made in pencil here, is just a pencil note made by my assistants telling where the man was stopping that was to inspect the herring. But the pen notes were in the letter at the time it was received.

Q. Do I understand that this letter constitutes a firm contract to buy this entire shipment; is that the purpose of it?

(Testimony of Floyd E. Ellis.)

A. The purpose of the letter is to give us instructions as to whom to deliver the herring to upon arrival in Seattle; also giving us the price at which the herring has been sold so we will know how to bill it or to make collection here before we permit the merchandise to leave our hands.

Q. That pertains to the whole shipment of 1358 barrels? A. That is correct, yes.

The Court: Is there any objection to that pencilled notation on there, referred to by the witness a moment ago?

Mr. Wakefield: No. No, I don't object to [109] that.

The Court: The ruling as to all parts of this exhibit including this letter as well as the telegram previously testified to by this witness is now admitted and will remain in evidence, the objections thereto being overruled.

(Libelant's Exhibit 11 received in evidence.)

Q. (By Mr. Hamlin): Did you employ anyone to inspect this shipment of 1315 barrels of salt herring upon its arrival in Seattle?

A. We did.

Q. Who did you employ? A. Pete Wahl.

Q. Is Mr. Wahl now living?

A. He is not.

Q. Do you know when he died?

A. In an accident on the railroad in December, 1946.

Q. What did you ask Mr. Wahl to do for you about this shipment?

(Testimony of Floyd E. Ellis.)

A. We simply asked him to inspect the herring upon its arrival and report its condition.

Q. What was Mr. Wahl's business?

A. Well, his business was that of inspecting and handling various types of fish, especially salt fish of different [110] kinds.

Q. Had you ever employed him before for this kind of thing?

A. We did it quite regularly.

Q. Do you know whether he inspected this shipment on September 4th? A. He did.

Q. Did you request a report from him regarding this shipment? A. I did.

Q. Under your arrangement with him, were you to pay him for this report and inspection?

A. Yes.

Q. Did he give you a report?

A. Yes, he did.

Mr. Hamlin: May we have this marked for identification, please?

(Letter from Wahl Brothers (report) marked Libelant's Exhibit 12 for identification.)

Q. (By Mr. Hamlin): Showing you what has been marked Libelant's Exhibit 12 for identification, can you tell me, Mr. Ellis, what that document is?

A. That is the report on the condition of the herring that arrived on the SS Denali, Voyage Number 55 [111] from the Apex Fish Company.

Q. By whom was that made?

A. By Peter A. Wahl of Wahl Brothers.

(Testimony of Floyd E. Ellis.)

Q. Is this the report to which you have just made reference in your prior testimony?

A. It is.

Q. Do you know who prepared this report?

A. Peter Wahl.

Q. Are you able to identify the signature at the foot of it? A. I am.

Q. Is that Mr. Wahl's signature?

A. It is the same signature, it appears to me, that he has been using for years.

The Court: That seems to the court to be an argument, your last statement. Can you answer the question?

A. (Continuing): Yes, it is his signature.

Mr. Hamlin: I offer Exhibit 12 in evidence.

Mr. Wakefield: If the Court please, I would appreciate Your Honor's looking at the exhibit if you have not already seen it.

The Court: I wish to see it further.

Mr. Wakefield: I object to it. Mr. Wahl is now deceased and this purports to be a report wherein [112] among other things, he expresses an opinion, Your Honor, as to the character of the fish and what may have caused the condition that he found.

The man is not here in court for cross-examination and I think it is incompetent, irrelevant and immaterial. It is hearsay and prejudicial to the respondent to admit in evidence the opinion of a material fact stated by a witness now deceased where we have no opportunity to cross-examine

(Testimony of Floyd E. Ellis.)

to find out the basis for the opinion he expresses, his qualifications to express one, what he did to determine the opinion that he does express and all of those things. It is highly improper as to that portion of it.

If the Court would feel so inclined, I think that we would have no objection to the report or the exhibit except the first sentence in paragraph 2 and the last paragraph. The rest of the exhibit I would not object to, but I strenuously object to the first sentence of paragraph 2 and all of the last paragraph as being purely hearsay and prejudicial without any opportunity of the respondent to cross-examine this witness to find out about it.

The Court: May I ask Counsel if he would have the same objection if this had been made by [113] a marine cargo surveyor or a so-called marine surveyor who was requested by one of the parties to inspect the condition about certain cargo and made a certificate and report upon his inspection as to condition of cargo; would Counsel feel that such a certificate is inadmissible and that the reason therefore is the same as those mentioned here by counsel concerning this communication?

Mr. Wakefield: Yes, as to expressions of opinion, Your Honor. As to facts, no. If he had stated that the fish was examined and its condition was so and so, and then went on and told the facts.

The Court: Have you any authority to support your objection which you wish the court to have the benefit of?

(Testimony of Floyd E. Ellis.)

Mr. Wakefield: No. I think it is almost elementary that the expression of opinion on a material fact by a deceased witness who cannot be cross-examined is inadmissible.

The Court: If that person is somebody who is a doctor or a lawyer or a minister of the gospel, or a chemist or specialist of some sort or other who is in the business of making certificates of condition reflecting his professional [114] opinion, does Counsel feel that his statement applies to such a certificate?

Mr. Wakefield: Yes, absolutely.

The Court: I am frank to say that I need the benefit of your authorities upon this question.

Mr. Wakefield: Your Honor, I haven't got any authority. I would certainly be glad to bring some but——

The Court: I am not aware at this moment of a limitation upon admissibility of a marine surveyor's certificate that it contains no opinion of the expert surveyor concerning condition. In view of the proof which has been made by this witness as to who this person was and what his business was, and what the purpose of obtaining this report was from this particular person, I am inclined to think that it stands in the category that is analogous to that of a marine surveyor's investigation and report concerning condition of cargo.

Mr. Wakefield: I was not aware that a marine surveyor's report would be admissible. I have never heard of it, Your Honor, unless the man is here in

(Testimony of Floyd E. Ellis.)

person to testify. I have a right to find out the basis upon which he expresses [115] his opinion. How does he know that it was heat? I want to know why.

The Court: It may be that if the surveyor was living he would have to come here and testify. That is possible. But now he is dead and cannot testify. Should the party for whom the inspection was made lose the benefit of this information now that the inspector is dead?

Mr. Wakefield: They have other experts. Captain Perry is here in the court room.

The Court: They do not have this one.

Mr. Wakefield: Regardless of that fact, Your Honor, I am very sure that an opinion on a material fact is not admissible——

The Court: Suppose this inspector, Mr. Wahl, was an employee of a concern whose business it was to make inspections of this sort and make reports on such inspections, and in the course of that employee's duty he made an inspection and made a report to his principal thereon and the principal kept that report in its permanent records; and suppose today somebody connected with that principal's business was asked to testify concerning it, could not the records so accumulated be admitted in evidence? [116]

A. Not on matters of opinion.

The Court: Does Counsel offering the exhibit have any authorities to submit in support of Counsel's offer?

(Testimony of Floyd E. Ellis.)

Mr. Hamlin: I have authorities, Your Honor, on the admissibility of the document as a memorandum made by an agent of a person party to the instant litigation provided such a general employee has since deceased.

(Argument by respective counsel.)

The Court: The Court is of the opinion that this is a part of the records of the addressee of this letter acquired in the ordinary course of its business and that the witness has sufficiently identified this as a part of such records and that it is admissible under the terms and provisions of the statute contained in twenty-eight—28 USC Section 695.

Let that exhibit be now admitted.

(Libelant's Exhibit 12 received in evidence.)

Mr. Hamlin: I now offer in evidence Libelant's Interrogatory Number 16: [117]

“Please state whether any of the barrels of salt herring mentioned in the Amended Libel discharged from the Denali prior to such strike and stoppage of work were in a damaged condition, and if so, how many?

“Answer: Some barrels discharged before the strike from Number 3 lower hold were alleged to be damaged, but respondent does not know how many. Mr. Johanson, who superintended the discharge of said cargo, states that after about 100 barrels had been discharged on September 4th, 1946, ‘I was informed by the dock that contents of the barrels were spoiled.’ ”

(Testimony of Floyd E. Ellis.)

The offer is made of the Interrogatory and of the Answer.

Q. (By Mr. Hamlin): Mr. Ellis, did you notify anybody on behalf of the carrier of the fact of this damage to the cargo?

A. I notified Mr. MacClellan the morning of the 5th of the damage to the cargo.

Q. Who is Mr. MacClellan?

A. The Claim Agent of the Alaska Steamship Company. [118]

Q. Did you make any arrangement with him for a joint survey? A. I did.

Q. Was that confirmed by any written communication from him?

A. Yes. There is a letter that I handed you there that gives that arrangement.

(Letter from Alaska Steamship Company, marked Libelant's Exhibit 13 for identification.)

Q. (By Mr. Hamlin): Handing you Libelant's Exhibit 13 for identification, can you tell us what it is, please?

A. This is a letter from Mr. MacClellan, the Freight Claim Agent, Alaska Steamship Company, sent to our firm to my attention regarding the spoilage of salt herring on the SS Denali, Voyage WSA 55, stating that—

The Court: What does it state?

The Witness: It states the Marine Surveyor—

The Court: You can't state the contents of the letter. The letter is not in evidence yet. That

(Testimony of Floyd E. Ellis.)

can be done only after it is received in evidence.

Q. (By Mr. Hamlin): From where did you produce that record? A. From my files.

Q. Is that part of your files?

A. It is.

Q. Can you identify the signature appended to it?

Mr. Wakefield: If the Court please, I have no objection to the letter as a letter from Mr. MacClellan but it is not material. Mr. MacClellan is here and Captain Perry is here. It talks about them. Let's get them on the stand. There is no materiality to the letter. It doesn't pertain to any issue in this case.

Mr. Hamlin: I think it does, if the Court please.

The Court: The Court doesn't wish the witness to state the contents of the documents until it is in evidence.

Mr. Hamlin: I am sorry that that happened, Your Honor. The letter is to be offered to show that there was a joint survey.

The Court: The Court will await further proof of the authenticity necessary to be established in connection with this matter.

Mr. Wakefield: Just to clear up Counsel's [120] point. The respondent makes no point or issue in this case about lack of notice. We will admit notice if that is what he is driving at.

The Court: Have you any objection to the admissibility of this exhibit?

Mr. Wakefield: Yes,—as to its not being relevant.

(Testimony of Floyd E. Ellis.)

The Court: Proceed to something else, then.

Mr. Hamlin: So long as that issue is admitted, I have no reason for offering the document, although it has been marked now.

The Court: Do you wish to withdraw it?

Mr. Hamlin: I think that would be advisable.

The Court: It is now withdrawn and it will be returned to Counsel who produced it.

(Libelant's Exhibit 13 withdrawn.)

(Wahl Brothers Invoices marked Libelant's Exhibit Number 14 for identification.)

Mr. Hamlin: Counsel has just agreed that the next four exhibits may be all put together, and that they may be offered and admitted as evidence that we have paid these items of expense. He is not admitting that they are authorized by his client. They are merely being offered to show that we paid [121] them.

The Court: These exhibits of which you speak should first have identifying marks.

(Group of bills marked Libelant's Exhibit 15 for identification.)

Mr. Hamlin: I then offer Libelant's Exhibit 15 for identification.

The Court: Is there any objection?

Mr. Wakefield: If the Court please, the exhibit consists of a number of bills marked "paid."

The Court: "Port of Seattle" seems to be the top of the billing. All of the bills seem to be on the letterheads or billing heads of the Port of Seattle with the exception of Laucks Laboratories

(Testimony of Floyd E. Ellis.)

invoice number 96267 and number 96557, and L. C. Perry, Marine Surveyor, Invoice Number 159.

Mr. Wakefield: I have no objection to the exhibits being offered as proof of the fact that those bills were paid. I do not admit that they all have to do with this case.

The Court: Have you any objection to their offer in evidence?

Libelant's Exhibit 15, do you have any objection to the offer of it in evidence at this time?

Mr. Wakefield: Not, as I have stated, that [122] they have paid the bills and that those are the bills that were paid. I don't admit that it is evidence of the fact that they were bills incurred as the responsibility of the libelant or in connection with this shipment of herring.

The Court: Well, that hasn't been proved yet, has it?

Mr. Hamlin: No, Your Honor.

The Court: Then that is a very material part of it. The objection is sustained subject to further proof. Proceed.

Q. (By Mr. Hamlin): Handing you exhibits which have been marked Libelant's Exhibit 14 and 15, Mr. Ellis, I will ask you first what is Exhibit 14 for identification?

A. A bill for inspection in culling herring from Wahl Brothers.

Q. What is the connection of that exhibit to the shipment of 1358 barrels of herring in suit herein?

(Testimony of Floyd E. Ellis.)

A. This is the inspection of 971 of those half barrels discharged on September 4th and 5th.

Q. There is another one there that covers an inspection when? [123]

A. Another one that covers an inspection on September 9th.

Q. Are you familiar with the usual charge for that kind of work? A. Yes.

Q. Do the amounts appearing on Exhibit 14 for identification conform to what is reasonable for what was done? A. Yes.

Mr. Hamlin: I offer Libelant's Exhibit 14.

Mr. Wakefield: May I ask the witness a question?

The Court: You may do so if it concerns admissibility.

Q. (By Mr. Wakefield): Mr. Ellis, didn't you testify a moment ago that this herring was sold subject to inspection?

A. Yes, that is correct.

Q. And Mr. Wahl would have inspected it anyway, wouldn't he?

A. He would have made the first inspection.

Q. How much did he charge for inspecting this lot of herring? A. \$67.97.

Q. Is that the only bill? [124]

A. There is another bill that isn't in connection with the first inspection.

Q. What is the next bill?

A. The next bill is for inspection and culling. That was to segregate the various degrees of dam-

(Testimony of Floyd E. Ellis.)

aged herring after it was determined that the herring was damaged.

Q. How much was that?

A. That amounts to \$99.00.

Q. What is the third bill?

A. This is later inspection and culling of herring on the last part that was delivered.

Mr. Wakefield: If the Court please, I have no objection to the first and second bills. The third one is objected to as not being shown to be connected with this case. It is an ordinary inspection that would have been made whether the fish was damaged or undamaged.

Q. (By Mr. Hamlin): Is that true, Mr. Ellis, that that first inspection would have been made whether the fish was damaged or not?

A. Yes, I believe it is.

Mr. Hamlin: I am very sorry that got in there, then. I ask permission to remove it. [125]

The Court: Exhibit 14 will be returned to Counsel and the parts that it is desired be deleted may be removed from the exhibit.

(Libelant's Exhibit 14 handed to Counsel and a part thereof removed from the exhibit.)

Mr. Hamlin: We have now extracted the objectionable portion of the exhibit and I renew the offer in evidence of Libelant's Exhibit 14 for identification.

The Court: Libelant's Exhibit 14 is now admitted.

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 14 received in evidence.)

The Court: What objection is there to Libelant's Exhibit 15? Do you wish to offer any more proof as to Exhibit 15?

Mr. Hamlin: Yes, I think I had better, Your Honor.

Q. (By Mr. Hamlin): Do you now have Exhibit 15 before you? A. Yes.

Q. Will you tell us what that exhibit consists of? [126]

A. These are wharfage and handling charges in connection with the discharge and moving of the herring into storage.

Q. You are now referring to invoices from the Port of Seattle, are you?

A. These are Port of Seattle invoices, yes.

Q. Are there any storage charges there?

A. Yes; there are storage charges.

Q. Are there any charges in those invoices which would not have been incurred by this shipment in the ordinary course of moving to the Port of Seattle if the buyers had accepted the goods?

A. Let me look through the exhibit.

Q. I mean which would have been incurred by the shipments.

A. Would you repeat that again, please?

Q. Yes, I think I had better.

Are there any charges appearing in the invoices in Exhibit 15 which would have been incurred by the shipment anyway in its normal passage through

(Testimony of Floyd E. Ellis.)

the Port, if the buyers had accepted the shipment?

The Court: Irrespective of damage would these charges have been incurred anyway in normal shipment; I believe is what was understood to be the question.

A. The wharfage item would be incurred in any case,—wharfage over the dock. [127]

Q. (By Mr. Hamlin): You have a notation on that top invoice, do you not, down in the lower left-hand corner, indicating how much is to be included in your claim?

A. That is right. There is a notation here of the normal charge for wharfage and the normal charge for handling which has been deducted from the claim.

Q. And it is that amount which is included in the libel herein, is that right?

A. That is correct.

Q. Except for that item, I take it there is nothing in there that the shipment would have incurred in its normal passage through the Port, is that right? A. That is correct.

Q. Then what is the next bundle of invoices there?

The Court: You are leaving the Court without any way of determining how much of the bill is a proper charge and how much is not. I have no way of knowing from what has been said.

Mr. Hamlin: I am sorry.

(Testimony of Floyd E. Ellis.)

Q. (By Mr. Hamlin): Let's go back to page 1 of the exhibit, please, Mr. Ellis. A. Yes.

Q. What is the total amount of the bill on that first [128] page?

A. \$256.12 is the total amount of the bill.

Q. How much of that would have been incurred by the cargo anyway in passing through the Port?

A. \$102.53 would have been incurred anyway.

Q. What is the proper amount to be included in the claim? A. \$153.59.

The Court: Was there some cents to the \$102?

The Witness: Yes. \$102.53, Your Honor.

The Court: That leaves \$153.59, is that correct?

The Witness: That is right.

The Court: You may proceed now.

Q. (By Mr. Hamlin): Now, the next invoices in Exhibit 15 are what?

A. The next one is for \$258.72.

Q. Well, that is a Port of Seattle bill, is it not?

A. That is a Port of Seattle bill.

Q. Well—— A. You don't want that?

Q. I don't think so.

A. The next bill is Laucks Laboratories, \$10.

Q. Is that a reasonable charge for the service they rendered? [129] A. That is right.

Mr. Wakefield: What about the Port of Seattle bills; are they withdrawn?

Mr. Hamlin: No. They contain a complete explanation on the face.

Q. (By Mr. Hamlin): Were the Port of Seattle bills and the Laucks Laboratory bills incurred in connection with this loss?

(Testimony of Floyd E. Ellis.)

A. They were, with the one exception that I mentioned on that first bill.

Q. Yes. And the next invoices are what in Exhibit 15? A. Laucks Laboratories.

Q. You testified about those? A. Yes.

Q. Are there two of them?

A. Yes, sir; there are two from Laucks Laboratories, one on September 5th, and one,—the second part of the shipment on September 30th; each for \$10.

Q. What do they cover?

A. They cover their inspection of the condition of the herring on the two times it was taken off the boat; that is, the first part of the shipment and the second part of the shipment. [130]

Q. The next one is L. C. Perry?

A. The next one is L. C. Perry.

Q. What services does that cover?

A. That covers his services as a Marine Surveyor, inspecting the condition of the herring and the stowage and so forth.

Q. What is the amount of that bill?

A. \$450.

Q. In your opinion, is that a reasonable amount?

A. I would consider it so for the work done.

Mr. Hamlin: I offer Libelant's Exhibit 15 in evidence.

The Court: Is any part of the exhibit 15 other than the \$102.53 an amount which would have been incurred anyway even if this cargo hadn't been damaged?

(Testimony of Floyd E. Ellis.)

The Witness: If the cargo hadn't been damaged, no, there would have been none other incurred.

Mr. Wakefield: If the Court please, I would like to point out, just so Your Honor can note it at this time, that we do not admit that those bills would not have been incurred anyway and I will have evidence later on in my case to prove that a portion of these bills would have been incurred regardless [131] of the damage. I make that note.

Secondly, I want to object to the exhibit, the item paid to L. C. Perry, not on the ground that it wasn't paid, but that legally it is not proper charge against the respondent.

They had Mr. Wahl survey and inspect this fish and Exhibit 14 is his bill. The rule is that they can't have more than one surveyor and charge it against the respondent.

The Court: Doesn't that go to the merit rather than to the weight?

Mr. Wakefield: I think it goes to the merits, yes.

The Court: Rather than admissibility.

Mr. Wakefield: I was making that observation as part of——

The Court: The objections noted are overruled with the exception of wharfage and handling in the amount of \$102.53. As to that, the objection is sustained.

In all other respects this Libelant's Exhibit 15 is now admitted, the objections thereto being overruled.

(Testimony of Floyd E. Ellis.)

(Libelant's Exhibit 15 received in evidence.) [132]

The Court: It is unfortunate that you have mixed up with these exhibits these inadmissible items and that the inadmissible items cannot be segregated and be physically deleted at this time.

Is the wharfage and handling part of this bill segregable from the other items? If so, I request that Counsel segregate it and physically detach it from the exhibit.

Mr. Hamlin: I am sorry. It did not seem it could be done that way. The best we have been able to devise is a little computation in the lower left-hand corner of the exhibit.

The Court: The Court has already made the computation. The total amount of the exhibit is reduced to the extent of \$102.53.

Mr. Hamlin: Yes, Your Honor.

Q. (By Mr. Hamlin): Had you made any arrangements for forwarding this shipment from the ship, if it was approved by the buyers?

A. Yes, we had.

Q. What arrangements had you made?

A. We had made arrangements with the railroads to order in cars upon inspection and approval of the fish.

Mr. Hamlin: You may inquire. [133]

Cross-Examination

By Mr. Wakefield:

Q. Mr. Ellis, if this shipment had not been damaged, will you tell us just what would have

(Testimony of Floyd E. Ellis.)

happened; it would have been taken out of the hold of the ship and placed on the dock. Then what would have happened from then on?

A. It so happened that two of the buyers of this material were in Seattle awaiting the shipment so that they could make inspection. They were down there the morning that the material was discharged and saw the material. Had they accepted, it would immediately have been loaded into cars that we had ordered from the railroad company to take the herring. There was a case there I think of one or two small lots to a Seattle buyer which would have been taken delivery of right on the dot as was customary with him.

Q. Mr. Wahl customarily opened and inspected all of these barrels upon arrival, did he not, in Seattle for you? A. He generally did.

Q. And that would have been done first?

A. Let me say this: He did at the time they were coming [134] off the boat.

Q. Do I understand you to say that had this fish been in sound and acceptable condition you would have had no charges nor wharfage, cold storage, dockage and handling inspection?

A. No. I have said that the wharfage should be deducted here, yes.

Q. Well, the others?

A. There would have no storage charge.

Q. Where would the herring have been kept until it was loaded on the railroad cars?

A. The cars were there ready to be loaded upon inspection and acceptance by the buyers.

(Testimony of Floyd E. Ellis.)

Q. Where,—on the dock? A. Yes.

Q. You mean that you had ordered the cars there in anticipation of this shipment?

A. We always arranged a,—the railroad have a special department for handling salt herring. We arranged with the railroads to have cars available upon our call to tell them that the herring was there and has been accepted and ready for movement.

Q. And those are refrigerator cars are they?

A. I think so.

Q. You mean it is shipped under refrigeration from here [135] to New York?

A. I think that is the practice. The manager of our Shipping Department handles the actual details on that and I would have to refer to him on that but I think that is the practice.

Q. Well, this matter of inspection by Mr. Wahl, was that a standard practice that you followed on each shipment as it was discharged to have it inspected?

A. We generally followed that procedure where the shipment was going to get out of our control, where it was going to be shipped out of the Territory. Where the herring was delivered right here on the dock to a person like, say, Mr. Bunzen and he accepted the quality of the herring, there was no necessity of having an individual inspector,—I mean a separate inspection. We did it for the protection of the Apex Fish Company where it was going out of the territory.

(Testimony of Floyd E. Ellis.)

We did it where it was going out of the Territory and there was no buyer here to inspect it for himself. Where there was a buyer here to inspect it for himself, that was unnecessary because he either accepted it or rejected it right there.

Q. The buyer can't inspect it himself. Somebody has to [136] open the barrels and re Cooper them.

A. Pete Wahl was right there for that purpose, to open it and let them examine it and they accepted it or rejected it right there themselves.

Mr. Wakefield: That is all.

Mr. Hamlin: No further questions.

The Court: Step down.

(Witness excused.)

The Court: We will take the recess at this time until tomorrow.

Court will now be adjourned until tomorrow morning at 10:00 o'clock.

(At 5:00 p.m., Tuesday, July 13, 1948, court recessed until 10:00 a.m., July 14, 1948, in the United States Court House.) [137]

Seattle, Washington

July 14, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: In the case on trial the court made certain statements regarding the admission in evidence of Libellant's Exhibit 12. The Court said, among other things, "The Court is of the opinion that this is a part of the records of the addressee of this letter acquired in the ordinary course of its business and that the witness has sufficiently iden-

tified this as a part of such record and that it is admissible under the terms and provisions of the statute contained in 28 USCA Section 695.”

All other words used by the Court in that connection are stricken physically out of the record and the court’s reasons for admitting the document will remain in the form just stated.

You may proceed.

Mr. Hamlin: Call Mr. John Kniseley. [138]

JOHN M. KNISELEY,

called as a witness by and on behalf of the Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. John M. Kniseley.

Q. Where do you live, Mr. Kniseley?

A. North Bend, Washington.

Q. What is your occupation?

A. I am a chemist.

Q. Employed by whom?

A. Laucks Laboratories, Incorporated.

Q. Are you an officer of Laucks Labs also?

A. Yes, sir.

Q. What office do you hold?

A. Vice President.

Q. What has been your professional formal education, Mr. Kniseley?

A. Ordinary grade and high school and graduated from the University of Washington with a degree in Chemical Engineering.

(Testimony of John M. Kniseley.)

Q. What year did you graduate? [139]

A. 1926.

Q. Have you pursued the occupation of a Chemical Engineer since that time? A. Yes, sir.

Q. Where? A. At Laucks Laboratories.

Q. What have been your duties,—just a summary of them, please.

A. We have been largely engaged in service to the public in a chemical engineering capacity.

Q. As a part of your work at Laucks Laboratories since 1926, have you had occasion to inspect foods? A. Yes, sir.

Q. How frequently would you say offhand you do that? A. Continually.

Q. Is that a daily occurrence with you?

A. That is right.

Q. What kinds of inspections do you make of foods,—for what purpose directly anyway?

A. To determine whether or not they are satisfactory for human consumption and whether or not they meet certain grades and qualifications which determine their price.

Q. Have any great proportion of these inspections been made of salt herring and allied products? [140]

A. I have inspected a great deal of salt herring, yes.

Q. Calling your attention to September 5, 1946, did you have occasion to inspect some half barrels of salt herring at the Bell Street dock in Seattle on that day? A. Yes, I did.

(Testimony of John M. Kniseley.)

Q. At whose request did you make this inspection? A. James Farrell & Company.

Q. Was anyone with you at the time of the inspection? A. I met Captain Perry.

Q. Where?

A. I don't recall exactly where. It was either at the dock or on the way to the dock. It was by arrangement that we met.

Q. Was anybody else there during the course of your inspection?

A. There was a man by the name of Pete Wahl.

Q. Do you know whose herring that was you were looking at? A. Apex Fish Company.

Q. Do you recall whether you went there during the day, or what part of the day was it?

A. It was in the afternoon.

Q. How many barrels were involved in this inspection?

A. The lot was designated as 971 half barrels, I believe. [141]

Q. How was your inspection carried out?

A. We selected at random certain barrels that showed evidence of some seepage of oil and other barrels that didn't show the evidence of seepage. Pete Wahl opened them for us and we examined the contents from both the top and the bottom. I say, "top" and "bottom" meaning that the fish are packed all belly up for the top and the back constituted the bottom.

Q. How did you go about inspecting them after the heads were off the barrels?

(Testimony of John M. Kniseley.)

A. Well, Pete reached down in there and got the fish out largely and handed them to us. We inspected them. We directed him just how far down we wanted him to examine and explore. It is rather a sticky proposition. Pete did the dirty work and we kept as clean as we could.

Q. What was the condition of the fish that you saw?

A. Well, this lot was in varied condition,—some barrels bad and some not so bad.

Q. What was the condition of the ones which you have designated as bad?

A. There was a layer of clear oil on the top of the barrels. The barrels were actually warm to the touch and the fish were warm to the touch. When you [142] examined the fish, there was a definite odor and the flesh of the fish was soft, and there was certain sluffing of scales,—every indication that they had been injured by elevated temperature.

Q. Did you measure the depth of the layer of oil on top of the barrel?

A. Only casual observation. There was no actual measurement with a ruler.

Q. Did you take any measurement of the temperature in any of the barrels in this shipment?

A. Yes, I did. I measured the temperature in the barrels. The highest temperature that I observed actually in the heart of a barrel was 77 degrees Fahrenheit.

Q. At what part of the barrel was that taken?

A. It was at about the heart of the barrel. I

(Testimony of John M. Kniseley.)

had a thermometer that was fifteen inches long and I thrust it clear down into the barrel.

Q. Did you take the temperature of the outside air at the dock at that time?

A. Yes. The normal temperature in that dock was 68 degrees.

Q. Did you go aboard the ship to inspect the compartment from which these barrels were taken?

A. Yes, I did.

Q. Did you take any temperature readings aboard the [143] ship? A. Yes, sir.

Q. In the compartment where these herring were taken from?

A. I would like to qualify that a little.

Q. Yes.

A. I was following Captain Perry around and he advised me that the Number 3 hold was where they came from. I had no first-hand knowledge that they came from Hold Number 3, but he advised me of that fact and I followed him down there and I did make observation of temperatures.

Q. Do you have a record of the temperature you took in Number 3 lower hold?

A. I don't have a written record of that but I have a memory of it.

Q. What was it? A. It was 80 degrees.

Q. Did you take the temperature of any other herring on the dock in order to check your observations?

A. Well, yes, I did. I measured the temperature in certain other barrels that had been standing on

(Testimony of John M. Kniseley.)

the dock in a comparable location to the ones that were in question and the temperature in those barrels was 65 degrees Fahrenheit. [144]

Q. Did you observe any correlation between the temperature of the barrels in this lot of 971 and the extent of the damage to the fish in the barrels?

A. There was a definite correlation between the high temperature and the bad fish.

Q. Are you able to advise the court from your experience as a Chemical Engineer whether or not the fish were in a state of decomposition which would have produced that high temperature, or would it be your conclusion that the decomposition was caused by the temperature?

A. I have never seen salt herring raise their own temperature due to decomposition. It has been my experience that they will decompose when stored in a room that is at high temperature, but I have had no reason ever to believe that they would spoil so rapidly that they would increase the temperature within the barrel unless they were very completely dried out.

Q. Were these fish dried out? A. No.

Q. Did you likewise make a later inspection of this shipment?

A. Well, I made an inspection of the balance of the lot. I might explain that the unloading of this thing [145] was interrupted at midnight, I believe, or 2:00 a.m., on the 5th. It subsequently was completed and then I examined the balance of the lot on September 26th.

(Testimony of John M. Kniseley.)

Q. What was the condition of that herring which you examined on September 26th?

A. It was soft and in poor condition.

Q. Did you examine each and every one of that balance or did you do that one at random also?

A. It was done at random.

Q. Did you find some that were good or was there some damage to everything you looked at?

A. Well, in this——

The Court: You may answer directly.

Read the question.

(Last question repeated by the reporter.)

A. I believe there was some damage to everything I looked at.

Mr. Hamlin: You may inquire, Counsel.

Cross-Examination

By Mr. Wakefield:

Q. Mr. Kniseley, what time was it on September 5th, [146] that you were down at the dock?

A. I don't recall the exact hour but it was in the afternoon about 3:00 o'clock, I would say.

Q. About three in the afternoon?

A. That is what I remember.

Q. Was it at that time that you took the temperature in the barrels? A. Yes.

Q. Was it at that time that you took the outside temperature? A. Yes.

Q. You said the temperature in the dock was 68 degrees. Was that under cover or out in the open?

A. That was in the dock, under the roof.

(Testimony of John M. Kniseley.)

Q. Inside of the warehouse or shed?

A. It was close to where the fish were stored.

Q. But that wasn't outside on the open dock?

A. No.

Q. How did you take the temperature in the hold of the ship?

A. I had this thermometer that I had been using in the fish and I was carrying it with me and I merely read it after having allowed time for it to reach equilibrium.

Q. Were you holding it in your hand or did you hang it [147] up on the wall or what?

A. It is a long thermometer and I held the top of it a long ways from the mercury bulb in my hand.

Q. Where were you standing?

A. At various places. We scrambled around in that hold quite a little.

Q. What I meant was, were you down on the deck or floor of the hold?

A. Yes. The time that I remember recording there this 80 degrees, and observing this 80 degrees, I was standing between two shaft alleys on the lower deck on the bottom of the ship.

Q. You were standing between the two shaft alleys and holding the thermometer in your hands?

A. By the top, yes.

Q. Did you have flashlights? A. Yes.

Q. Was there any one aboard the ship to take you down there or how did you get down in the lower hold?

(Testimony of John M. Kniseley.)

A. Well, I was with Captain Perry and the watchman, I believe, helped us uncover hatches and scramble down in there.

Q. Oh, the hatches were covered before you went down?

A. There were tarps on top of the hatches. I don't recall whether they were completely covered or not [148] but the ladder was covered.

Q. This watchman, was he the only one you saw aboard the ship? A. I believe so.

Q. You didn't go into any other hold, did you, other than Number 3? A. Not that I recall.

Q. While you were down there, Mr. Kniseley, did you look around the hold or make any other examination than the taking of the temperature?

A. We spent some little time in that hold. I don't remember exactly all that transpired there. It has been some time past. I didn't take written notes on the trip into the ship because——

Q. Was the hold empty at the time?

A. That I don't recall.

Q. I understood you to say, Mr. Kniseley, that judging from the condition of the herring when you examined it, that you were of the view that it had been injured by elevated temperature, is that what you said? A. Yes.

Q. You have had quite considerable experience with herring, haven't you, particularly when you first started your work some years ago?

A. Yes. [149]

Q. Can you tell us what temperature would be

(Testimony of John M. Kniseley.)

required in your opinion to cause a barrel of herring which was properly cured to break down or go to pieces or become soft and damaged?

A. I don't wish to evade giving you a direct answer and that is not my intent but I would like to explain that, if it is all right.

The Court: You haven't made any answer to explain yet.

Mr. Wakefield: I would like him to explain. That is what I am getting at.

The Court: The answer given in his direct examination, is that what you are inquiring about?

Mr. Wakefield: Yes. He said it was injured by an elevated temperature and I am now asking how much temperature in his opinion it would take.

The Court: Can you answer that question, responding to it directly in the form in which the question is put?

The Witness: It is difficult.

The Court: I believe you are called as an expert witness. I assume you can discuss a difficult question. I think you ought to answer the question.

(Last question repeated by the reporter.)

A. If I could get off the record for a minute, I could straighten out the problem which is in my mind.

The Court: All right. You may speak off the record and propound any question you wish to ask of Counsel with a view to clarifying the question in your mind.

The Witness: It is a question of time and temperature. The two cannot be divorced. When you

(Testimony of John M. Kniseley.)

asked me what temperature will injure, then you must ask me some length of time because they would stand a high temperature for a very short time and not spoil.

The Court: What you have just said is off the record.

The Witness: Yes.

The Court: Do you wish to modify the question in any way or do you wish to leave it as it is?

Mr. Wakefield: I will modify the question, Your Honor.

The Court: Very well. **On the record.**

Q. (By Mr. Wakefield): Can you tell us, Mr. Kniseley, your opinion as to the amount of temperature and the length of time the being subjected to that temperature would be required for a barrel of herring [151] properly cured to go to pieces and become soft such as you found in the herring in question?

A. I would estimate that it would require about five days at 77 degrees.

Q. About five days at 77 degrees? A. Yes.

Q. Have you ever made any actual tests to that effect? A. No, sir.

Q. Have you ever made any tests with herring to determine how much temperature for how long it takes to break down?

A. You mean laboratory tests?

Q. Yes? A. No.

Q. Going back to the same question which you answered "about five days at 77 degrees," would

(Testimony of John M. Kniseley.)

that answer require any qualification depending upon the degree of cure that the herring had been given? A. Yes, I believe so.

Q. Are you familiar, Mr. Kniseley, with the shipments of so-called Norwegian-cured herring; do you know what that cure is,—the hard-cure herring? A. I believe so.

Q. What would you say concerning the hard-cure herring and whether or not it would break down in about five [152] days at 77 degrees?

A. I believe it would.

Q. Have you had any experience with that and do you know anything about it or are you guessing about it?

A. I have had a good many years' experience with it.

Q. I am talking about the shipments of Norwegian herring that come from Norway to Seattle via the Panama Canal in ordinary stowage without refrigeration.

A. No, I haven't had too much experience with those shipments.

Q. Did you check this particular shipment of herring in question here as to the degree of salinity or the saline solution in the barrels?

A. No, I didn't.

Q. Isn't that an important factor in inspecting barrels of herring, to determine how much it has been cured or how strong a cure it has?

A. It is necessary to have heavy brine on them. But in this particular instance Pete Wahl stated

(Testimony of John M. Kniseley.)

that they were brined and I accepted his statement.

Q. You said it is necessary to have a heavy brine; just explain that further?

A. It is practically a saturated brine.

Q. Does that brine vary in degree or intensity from a mild brine to a heavy brine, or when you say brine [153] do you mean just one thing?

A. In my experience when we rebrine the herring we use practically a saturated brine and that was all there was to it.

Q. So the brine is more or less uniform, is that what you mean?

A. As far as the brine that you find on the fish. The brine that we put back into them was fairly uniform, yes.

Q. What then determines the degree of cure of a herring?

A. It is the amount of salt that is put on them.

Q. You do that when it is originally packed?

A. Yes.

Q. Then by the time you put this brine in that you are speaking of, this more or less uniform brine, the herring then has its cure? A. Yes.

Q. So the brine doesn't affect the cure one way or the other? A. No.

Q. From your experience with herring—this mild-cured—is it a commodity which is sensitive to or affected by the sun,—the heat of the sun?

A. The heat of the sun; yes, it is affected by the heat of the sun. [154]

(Testimony of John M. Kniseley.)

Q. Is it not a fact that the salt used for the curing of herring and the brine itself are,—I may state this awkwardly, but what I am getting at, they are factors or elements which are akin to refrigeration; in other words, don't they have characteristics of retaining cold?

A. I am not clear on that question.

Q. Specifically I want to know if the brine and salt such as you find in a barrel of herring would under ordinary circumstances retain the cold more so than say water or oil or other liquids?

A. More so than oil,—only slightly more so than water.

Q. Aren't those cooling agencies, that is what I am driving at,—the brine and salt, aren't those cooling agencies?

A. They are not a cooling agency.

Q. You would expect, then, that a barrel of herring packed with a mild cure and a barrel of water, side by side in the same temperature, would acquire the same amount of heat inside?

A. I am trying to avoid being technical on this thing and be practical on it. There are a number of different factors that affect that. I think the barrel of water,—if the fish had just water in the barrel, that it would get warm quicker, but not [155] because there was any cooling agency to the salt.

The Court: Did you ever make ice cream in a hand-turned freezer?

The Witness: Yes, sir.

The Court: Did you ever see salt used with the ice in that process?

(Testimony of John M. Kniseley.)

The Witness: Yes.

The Court: What effect, if any, does the salt have in that operation?

The Witness: It causes the ice to melt.

The Court: It causes it to melt and do what with respect to freezing the cream inside the freezer?

The Witness: It is the melting of the ice that cools and not the solution of the salt in the water.

The Court: It is your opinion that the salt does not retard the melting of the ice but on the other hand accelerates and causes a melting of the ice?

The Witness: It causes the ice to melt and it is the melting of the ice that absorbs heat.

The Court: You may inquire.

Q. (By Mr. Wakefield): The question of whether or not the berring of herring will generate its own heat, [156] I think you said that it wouldn't raise its own temperature. You are familiar with herring meal and fish meal? A. Yes.

Q. And that generates a whale of a lot of heat, doesn't it? A. That is right.

Q. As a matter of fact, it is subject to spontaneous combustion? A. Yes, sir.

Q. Fires frequently occur in the holds of ships from herring meal? A. Yes.

Q. Mr. Kniseley, don't you think that if a barrel of herring was not sufficiently or properly cured—by sufficiently I mean enough salt used—and by properly I mean a herring having feed in it or otherwise not being properly cleaned and pre-

(Testimony of John M. Kniseley.)

pared—and that barrel of herring stood around for two weeks, three weeks or four weeks and started to decompose, don't you think that after a lapse of time of say thirty days or three weeks that there would be some heat generated within the barrel from the process of decomposition?

Mr. Hamlin: That is objected to on the ground [157] it is entirely irrelevant and immaterial.

There has been no showing that there was any herring involved herein which had feed in it or which was improperly cured.

The Court: What is there about the record which entitles you to ask that question in your opinion, Mr. Wakefield?

Mr. Wakefield: That is one of our contentions, our Honor. He said on direct examination that herring won't raise its own temperature in the barrels. I am trying to find out what kind of herring he is talking about or under what conditions it won't raise its own temperature.

The Court: The objection is overruled.

The Witness: I will have to have the question read again.

(Last question repeated by the reporter.)

A. There would be some heat generated in the barrel, but not necessarily a rise in the temperature.

Q. (By Mr. Wakefield): Will you explain that last remark,—“not necessarily on a rising temperature” did you say?

A. There would not necessarily be a rise in temperature. [158] I am being a little technical here

(Testimony of John M. Kniseley.)

but you asked that question and I try to answer it the best I can. The barrel of herring is wet and the evaporation of water on the outside is a strong cooling action. To imagine that you could get enough bacterial decomposition in the center of the barrel to offset that strong cooling action is, to my mind, impossible.

Q. Are you assuming that this barrel of herring we are talking about is wet on the outside?

A. I believe I stated in my direct examination that if the herring were wet and had not dried out that then the temperature could not go up.

Q. Do you mean the outside of the barrel was wet?

A. Yes.

Q. Oh, I didn't understand that. So what you have testified to with respect to generating heat or raising the temperature has reference to a wet barrel?

A. That is right.

Q. Wet on the outside?

A. Wet on the outside because it is wet on the inside.

Q. But not to a dry barrel.

A. To a barrel that has water in it. Let me change it to that.

Q. What from your experience would be the range of temperature, [159] within how many degrees you want to give as a range, of a barrel of herring mild cured that was in a normal, proper condition inside?

A. I don't understand that, sir.

Q. Well, suppose you were up at Port Wakefield at the time herring was,—or you took a barrel

(Testimony of John M. Kniseley.)

of herring out of the warehouse at Port Wakefield and opened it up and took this same kind of a temperature that you say you took in the herring on the Bell Street dock, what range of temperature would you expect to find?

Mr. Hamlin: That is objected to as calling for a very hypothetical conclusion or guess on the part of the witness. There are not enough facts stated in that question upon which to base any answer.

The Court: If the witness understands it, he may answer.

A. I would expect the herring to be down below 70 degrees.

Q. (By Mr. Wakefield): That is quite a range. "Below 70" might be 60, 50, or 40. Can't you tell me what the normal temperature is in a barrel of herring in good condition that you would expect to find, that [160] is?

A. That depends entirely upon the outside temperature and the relative humidity of the air around the barrel and exposure to direct sun; also the velocity of the wind. There are so many factors that I can't tell you.

Q. Have you ever taken the temperature of other barrels of herring that you can recall?

A. Yes.

Q. Well, tell us what some of those were?

A. In the neighborhood of 60 or 70 on the dock when it is being worked.

Q. 65 to 70? A. Yes.

Q. How long, Mr. Kniseley, in your opinion,

(Testimony of John M. Kniseley.)

would it take a barrel of herring which was 70 degrees inside the barrel to spoil?

A. You mean to completely spoil?

Q. No; to the degree that you found this herring in question in this case spoiled, we will say.

A. It would take a much longer time. I am a little ambiguous on that. If you want me to guess, I will guess. I am not certain at all.

Q. Well, I am not pinning you down to definite days. I want to know in general. [161]

A. I would estimate between 30 and 45 days.

Q. Between 30 and 45 days? A. Yes.

Q. And the 77 degree herring you say would spoil in five days?

A. That is my opinion, yes.

Q. Suppose the temperature in the barrel was only 65, how would that change the length of time?

A. It would stretch it out quite a lot, I think.

The Court: Had you examined any other shipments of salt herring in barrels coming down from this same plant before this occasion?

The Witness: Years prior to that.

The Court: Years prior to that?

The Witness: Yes, sir.

The Court: Had you examined any other barrels of salt herring in other shipments coming from other Alaskan localities?

The Witness: Yes, sir. I don't know whether it is necessary to state it in the record but I was——

The Court: No. Just say whether or not you have.

(Testimony of John M. Kniseley.)

The Witness: Yes, I have.

The Court: You may inquire. [162]

Q. (By Mr. Wakefield): Mr. Kniseley, assume the situation of a barrel of herring improperly packed or improperly cured which is wet on the outside and loaded aboard a ship, and let's assume further that the inside temperature of the barrel is say 65 degrees and that within ten or twelve days the temperature of that same barrel is 77 degrees, an increase of 12 degrees, can you give us any estimation of how much heat it would have to have been subjected to during that 12 days to raise the brine temperature or the barrel temperature from 65 degrees to 77 degrees?

What I want to know is how high a temperature the outside air, or the air surrounding the barrel, would probably have had to have been to make that much increase?

A. Eighty degrees in the condition of a hold of a ship.

Q. Eighty degrees? A. Yes.

Q. For 12 days? A. Yes.

Q. Do I understand that the herring you examined on September 5th was not uniformly bad; some was worse than others, and some fairly good, was that what you said? A. That is right.

Q. Will you just explain the difference of what you meant by bad and others not so bad?

The Court: Were the last question and answer directed to this particular shipment here in question?

(Testimony of John M. Kniseley.)

Mr. Wakefield: Yes—that which was discharged on the 5th of September.

The Court: You may answer the question.

(Last question repeated by the reporter.)

A. The barrels that were the worst had this layer of clear oil on the top. The fish were decidedly soft and had slacked down in the barrel. Those that were not so bad—there was some separation of oil but it wasn't a clear layer, it was more white like a mulsified oil. The fish had not slacked down so bad, the odor wasn't so bad, and they were not near as soft when you broke them with your hand.

The Court: Did you find a varying degree of damage or did you find some barrels without any damage; what do you mean to say with respect to that if you have any information on that?

The Witness: I didn't find any that would have been considered, I don't think, top quality although some of them would have been considered fair, merchantable quality. [164]

The Court: You may inquire.

Q. (By Mr. Wakefield: With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they compare with those that you examined on September 5th?

A. The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

A. Yes.

(Testimony of John M. Kniseley.)

Q. You made the statement, Mr. Kniseley, on direct examination as I recall, that there is a definite relation between the temperature and bad condition of the fish.

A. I believe that was with regard to this particular shipment.

Q. Well, isn't that true as to any herring; the temperature affects any herring, doesn't it?

A. Yes, it does.

Q. When you speak of temperature, do you have any particular kind of temperature in mind—anything other than atmospheric temperature is what I am [165] getting at.

A. Well, sir, of course, according to my mind temperature is a unit of measure and there aren't very many kinds of it. It is either at that temperature or it is not.

Q. Well, the sun's rays would be the kind of temperature you are speaking about?

A. The sun's rays are a source of heat.

Q. Let's suppose that the sun is out and it is 80 degrees; that is the kind of temperature you are speaking of, isn't it?

A. Well, the 80 degrees certainly is.

Q. What I am getting at, you made a reference in your direct examination to "a high temperature" which means any kind of a heat measurement.

A. Yes, sir. Anything which created that temperature would probably have caused the damage.

The Court: Did you make any notation of outside temperature on that dock at Bell Street on the days that you made these temperature tests?

(Testimony of John M. Kniseley.)

The Witness: Yes. I recorded the temperature alongside of the shipment and it was 68.

The Court: On the outside of the building or dock structure? [166]

The Witness: Not on the outside of the dock structure but beside where the herring was stored I made a temperature record.

The Court: How much was that outside temperature on the days when you made the inspection?

The Witness: In the dock it was 68.

The Court: Do you call that outside temperature; you say "in the dock"?

The Witness: No, that would not be the same temperature that I would get if I would go out on the apron of the dock, for instance.

The Court: That means inside the dock structure?

The Witness: Yes.

The Court: You didn't take the outside temperature outside of the enclosed wall of the dock structure, is that your statement?

The Witness: That is right. I did not.

The Court: You may inquire.

Q. (By Mr. Wakefield): How many barrels did you actually examine on the 5th of September?

A. I think I opened ten or twelve barrels.

Q. Did you take the temperature of all of those?

A. I believe I did. [167]

Q. I think the figure of 77 degrees which you gave us you said was the highest or maximum?

(Testimony of John M. Kniseley.)

A. That is right.

Q. What other temperatures did you get in the other ten or twelve barrels?

A. I got varying temperatures between 70 and 72, and 77.

Q. How many were at 70?

A. I didn't make a record of each barrel. I merely went along with my thermometer and I was reading maximums, and minimums, and searching for the highest and the lowest.

Q. Did you have one barrel at 77 or two barrels, or how many barrels at 77?

A. I believe I actually found one barrel at 77.

Q. Just one barrel? A. Yes.

Q. How many were at 70?

A. I think I found one at 70.

Q. How many at 72?

A. I don't recall exactly.

Q. But the temperature on the ten or twelve barrels that you actually examined varied from 70 to 77? A. That is right.

Q. And you recall that only one out of that number was [168] 77? A. Yes.

The Court: Unless each counsel would object to doing so, I would be glad to know if this witness has an expert knowledge or opinion concerning the difference in outside and inside temperature at this dock on the days that he was making this test.

Of course, if Counsel object to bringing that out, they need not ask the question.

(Testimony of John M. Kniseley.)

Mr. Wakefield: I have no objection.

Q. (By Mr. Wakefield): Can you tell us what the outside temperature was in comparison to the 68 you found in the dock?

A. I don't know. To be frank with you, I didn't consider it important because the problem I had in mind was could those herring have acquired the temperature from standing in that dock?

The Court: Were any of the herring barrels stowed temporarily on the dock structure outside of the structure's enclosing walls?

The Witness: None that I saw.

The Court: Then the question is not material.

You may proceed. [169]

Q. (By Mr. Wakefield): I don't think, Mr. Kniseley, I quite understood what you mean by taking the temperature of other barrels on the dock.

You said something about 85 degrees. What was that?

A. Well, I took the temperature of the dock and then the herring will normally be some few degrees lower than the temperature of the dock, depending on the relative humidity of the air, and I wanted to know just what temperature a barrel sitting on that dock would acquire if it had time to reach equilibrium, so I hunted up a barrel that had been there for some time and opened it up and took its temperature. It was 65 degrees.

Q. You say it had been there for some time?

A. That is something I was informed of by Pete Wahl.

(Testimony of John M. Kniseley.)

Q. That wasn't one of the barrels out of this shipment? A. That is right.

Q. But you don't know how long it had been there or anything about this particular barrel?

A. Nothing more than what Pete Wahl told me.

Q. This barrel that you found to be 65, did you make any other tests as to the degree of salinity of the brine or any conditions like that?

A. No. It was merely a guinea pig to see what temperature [170] a barrel would reach, setting on that dock.

Mr. Wakefield: I think that is all. Thank you.

The Court: Did you ever walk along the waterfront on a warm summer day in Seattle and experience the outside heat on your body?

The Witness: Yes.

The Court: Did you ever, then, immediately while sensing outside atmospheric heat walk inside of the dock within the enclosing walls and within the shed of the dock?

The Witness: Yes.

The Court: Did you experience any change in your body temperature?

The Witness: It always felt cooler to me.

The Court: How much cooler would you say?

The Witness: (No response.)

The Court: Or express it in another way. How long did it take you to experience a feeling of bodily cooling in your bodily temperature after walking under the walls of the dock shed?

(Testimony of John M. Kniseley.)

The Witness: A comparatively short time.

The Court: Have you any opinion as to how much the difference was or customarily is between outside summer heat in Seattle and the temperature [171] inside of the dock's enclosing walls and underneath the shed roof of the dock?

The Witness: It would depend a great deal upon the structure of the dock and all, but I would estimate it to be between 5 and 8 degrees.

The Court: You may inquire.

Mr. Wakefield: May I ask one or two questions which I overlooked?

The Court: You may do so.

Q. (By Mr. Wakefield): Mr. Kniseley, you said you arrived there about 3:00 in the afternoon. I take it that the barrels of herring were inside of the dock structure at the time you arrived there.

A. Yes.

Q. Do you know when they were put in there?

A. No, I don't.

Q. You don't know how long they had been inside? A. No.

Mr. Wakefield: That is all.

Redirect Examination

By Mr. Hamlin:

Q. Mr. Kniseley, in the situation which the court suggested [172] to you, namely, walking along in the sunlight and feeling warm, the heat which your body might attain by reason of being in the direct rays of the sun would not necessarily

(Testimony of John M. Kniseley.)

be the same as the atmospheric temperature, would it? A. That is correct.

Q. In other words, your body would be receiving heat because it was placed in the rays of the sun which are light rays and convey heat 93 million miles away from the sun, isn't that true?

A. That is right.

Q. But they do it without warming the air in passing through it, isn't that correct?

A. It is possible that they can go through the air without raising its temperature too much.

Q. Well, I am assuming air that has no dust particles or other such matter in it.

A. Yes.

Q. Are you familiar with the way temperatures are taken of outside atmosphere? Perhaps I should explain. I mean are thermometers placed in the sunlight or in the shade when taking atmospheric temperature outside?

A. Always in the shade.

Q. I believe you answered the court's inquiry that the [173] temperature inside a dock or other structure might possibly be warmer than it is outside. I wish you to tell us the process whereby you arrive at that conclusion, too.

The Court: I believe the witness said he thought it would be cooler on his body inside the dock structure.

Mr. Hamlin: Yes, that is true. I understood—am I correct in this—that the witness also said that the atmospheric tempearture might be warmer inside the structure. Is that correct?

(Testimony of John M. Kniseley.)

The Court: I didn't get that impression but maybe you would be justified in getting that impression. I personally did not get that impression.

The Witness: I don't recall that.

Q. (By Mr. Hamlin): Can you explain to us now the process whereby the temperature of the air is raised by the heat from the sun?

A. The temperature of the air raised by the heat from the sun?

Q. Yes; how does that occur?

A. The heat from the sun is entirely radiant heat. It must strike some object, be absorbed and raise the temperature of that object. Then, if that object [174] in turn transmits heat to the air by convection, it can raise the temperature of the air.

The Court: May I ask you directly if in your examination and inspection of these barrels you attributed any of the elevated temperature you found to outside summer atmospheric temperatures; did outside summer temperatures in any way affect the temperature of this herring which you found it to have in the barrels at the time you examined it?

The Witness: I don't think on the day of September 5th that it had any affect on those barrels.

Q. (By Mr. Hamlin): Mr. Kniseley, I think you stated that it was the salt and not the brine which determined the cure of salt herring.

When you explained that, did you mean the hard salt which was placed on the fish or the amount of salt in the brine?

(Testimony of John M. Kniseley.)

A. The fish are salted and the salt draws water out of the fish so that after it has been cured for some time the brine reaches a certain equilibrium. It was the condition of that brine after equilibrium that I was referring to.

Q. Is it true that the chemical process which goes on, [175] —will you explain what the chemical process is which goes on as the fish are cured?

A. The process of dehydration.

Q. Is that anything like the process which is known as osmosis?

A. That is the mechanism by which the process proceeds.

Q. Will you state exactly what it is that occurs in this osteomatic process?

A. It is a fundamental truth in nature that water will travel from a dilute solution to a more concentrated one. They put enough salt in so that the brine is more concentrated than the solutions that are in the fish.

The Court: At this point the court will take a 5-minute recess.

(Recess.)

The Court: You may resume the redirect examination.

Q. (By Mr. Hamlin): Mr. Kniseley, I am going to ask you to assume a cargo of barrels of salt herring piled in the ordinary fashion in the hold of a ship. I am going to further ask you to assume that the hold of the ship has an atmospheric temperature [176] above that of the barrels of salt

(Testimony of John M. Kniseley.)

herring. I am going to ask you to assume that the herring is carried in that hold for a period of approximately twelve days and ask you whether the barrels piled therein would in that period attain a uniform temperature in each barrel?

A. I don't think they would.

Q. Will you explain why?

A. The mechanism by which the barrels reach equilibrium with the surrounding temperature in the hold of the vessel is largely by convection. That consists of the cold air which would become cold by being in contact with the herring barrels dropping to the bottom of the ship and traveling sideways to some hot surface, and when it came in contact with that hot surface it would tend to rise like a chimney and when it went up it would come in contact with more cold fish and it would go around and around like a windmill. That is the actual mechanism by which the heat is conveyed. That naturally could not take place uniformly throughout the hold of the vessel.

Q. Do such currents normally reach every portion of an enclosure or are they affected in some way by what is within such an enclosure? [177]

A. They normally seek a path of least resistance and that is a haphazard path or channel—wherever the stowage would direct it.

Q. You had some discussion with counsel about wet barrels and dry barrels.

I ask you whether any wooden barrel containing water would fit within your classification of a wet barrel or a dry barrel?

(Testimony of John M. Kniseley.)

A. A wooden barrel full of water I would refer to as a wet barrel.

Q. Would that same apply to a barrel containing herring in a brine solution? A. Yes, sir.

Q. Why would you call it a wet barrel?

A. Because a half-inch barrel stave couldn't be wet on the inside and totally dry on the outside.

Q. How does it get wet on the outside?

A. By a process of penetrating through the wood. The water actually goes in solution in the wood.

The Court: Until it gets how far—until it gets to the outside of the wood?

The Witness: Yes.

The Court: And there what happens to it?

The Witness: It evaporates.

The Court: What makes moisture appear on [178] the surface of a glass?

The Witness: That moisture comes from the air.

Q. (By Mr. Hamlin): Are you referring to a glass colder than the atmospheric temperature?

A. Yes. Otherwise, there would be no moisture on it.

Q. That is condensation, is it? A. Yes.

Q. I think you mentioned that these wet barrels would have a tendency—the water would evaporate from the outside, is that true?

A. That is correct.

Q. And for a period that would have a cooling action?

(Testimony of John M. Kniseley.)

A. As long as that evaporation took place, there would be a definite cooling of the contents of the barrel.

Q. What would happen to that evaporation factor in an enclosed area such as the hold of a ship; would it continue throughout a period of twelve days? A. No.

Q. What would happen?

A. As soon as the air had absorbed as much water as it could contain, which is a relatively small amount, then all evaporation would cease and cooling would cease. [179]

Q. What would happen to the temperature of the barrels of salt herring in such an enclosure, the sides of which were warmer than the barrels, after evaporation stopped; would that have any effect upon the barrels' absorption of heat?

A. The barrels would tend to reach equilibrium with their surroundings.

Q. Would it affect the speed with which the temperature would change in any way after a saturation point was reached?

A. Yes, of course.

Q. In what way?

A. The elevation of temperature is the result of two things, the amount of heat put in and the amount of heat taken out. And the elevation of the temperature is the difference. If there is no heat taken out, the temperature naturally goes up when heat is put in.

(Testimony of John M. Kniseley.)

Q. You have testified at length about the bringing of herring under Counsel's questioning.

Will you state what experience, if any, you have had in the matter of applying brine to salt herring?

A. I was employed for a number of years as a recooper—rebrine man on the Seattle Waterfront.

Q. For how many years were you so employed?

A. Off and on over a period of six years.

Q. What were your duties as a cooper and rebrine man?

A. We opened the barrels and examined brine—to see if it was high enough, and examined the fish and did mechanical work about the barrel, repaired it, bored a hole in the barrel and poured brine in it and rebunged it and rolled them around.

Q. Was it a part of your duty to measure the amount of brine necessary in that work?

A. We always figured on a tight barrel. We always filled them full.

Q. A saturated solution, do you mean?

A. The solution was usually about 90 per cent saturated.

The Court: The answer is not a direct answer to the question. It seems to me the question remains unanswered. He has discussed the question but he hasn't answered it.

Q. (By Mr. Hamlin): I think the question was whether it was a part of your duties to ascertain the proper strength of brine to put in the barrel.

A. That actually was not a part of my duties at that time.

(Testimony of John M. Kniseley.)

Q. Has it ever been since? [181] A. No.

Q. I think you were describing the procession of osmosis which takes place when fish are placed in brine and salt when we took a recess.

Do you wish to say anything more about that process—about the mechanics of it?

A. I don't recall exactly what I did say.

Q. What process takes place when salt is placed on the herring and they are then put in brine in an enclosed barrel?

A. The fish commence to dehydrate.

Q. The name of that process again, is what?

A. By the process of osmosis.

Q. And mechanically what happens to the cells of the fish in that process?

A. They liberate the water from the cells of the fish and it goes into the brine.

The Court: Do you mean it becomes the brine when that moisture is mixed with the salt?

The Witness: Yes. It dissolves the salt and makes brine.

Q. (By Mr. Hamlin): I want you to assume a brine having a strength of 85 per cent solution is placed in a barrel of salt herring at the time of repacking [182] and that the barrels are permitted to stand for a period of from 12 days to a month, would any change occur in the strength of the brine solution during that period?

A. I believe it would.

Q. What would that change be?

A. As the fish liberated water and diluted that brine, it would become weaker.

(Testimony of John M. Kniseley.)

Q. What effect would that have on the strength of the brine solution?

A. It would appear to be weaker.

Q. Let's assume further that the particular herring involved in my last questions were caused to deteriorate through subjection to excessive heat, what effect would that have on the strength of the brine solution during that period?

A. The process of deterioration; it liberates moisture from the fish and that would dilute the brine.

Q. Would it dilute it more so than if the fish did not spoil? A. That is correct.

Mr. Hamlin: I think that is all. [183]

Recross Examination

By Mr. Wakefield:

Q. Mr. Kniseley, in answer to a question propounded by the Court you replied, as I understood you, that you didn't think the conditions existing on September 5th had anything to do with the temperature of the fish as you found it.

As I understood the court's question, it was whether or not outside summer temperatures would have any effect on the barreling of herring.

Did you mean to say that no outside summer temperatures would have any effect or merely that on September 5th it didn't have effect on what you actually found?

A. I meant that—I was trying to confine my answer, so it wouldn't be ambiguous, to September

(Testimony of John M. Kniseley.)

5th, and the conditions which existed there. I didn't want to make any comment about outside summer temperatures. I think everybody knows that if it is hot and the fish are out there, it will get hot.

Q. Would you tell us why you took the temperature in the center of the barrel instead of on the outside ring—I don't mean on the outside of the barrel but close to the outside of the inside.

A. I took it there because I thought that would more nearly represent the temperature of the fish as distinguished from the rim around there that was having this cooling process going on all of the time.

Q. If there is heat in the barrel and it doesn't come from inside from decomposition, it has got to come in from the outside, doesn't it?

A. Yes, sir.

Q. So, how would the center be hotter than the outside; I don't understand it.

A. The barrel must have been warmer at one time than it was at the time that I observed it because of the fact that the high temperature was in the center.

Q. Did you take the temperature any place but the center? A. Yes, I did.

Q. What did you find on the outside?

A. Along the outside it approached the temperature of the dock.

Q. Did you actually take those temperatures?

A. Yes.

Q. What was the range of them?

(Testimony of John M. Kniseley.)

A. They ranged around 70. Practically all of the barrels were about 70 on the outside.

Q. In taking these temperatures and making your inspection, you testified on direct examination, as I recall, that [185] you selected the oily barrels. What would an oily barrel indicate?

A. That it had spoiled.

Q. And this oil would be apparent where?

A. Oh, there were signs of it seeping around the head.

Q. In other words, that is a leakage of oil from the inside of the barrel to the outside?

A. A wooden barrel will hold water but it won't hold oil hardly at all.

Q. So you actually selected the worst barrels, did you not? A. Yes.

Q. When Mr. Hamlin was asking you about your experience with herring, actually working as a cooper or rebriner, you started to tell us about 90 per cent solution and then you didn't go on with it. Is that the per cent solution of the brine that you used? A. In rebrining, yes.

Q. 90 per cent? A. Yes.

Q. Was that with relation to mild cure or Scotch cured herring? A. Yes.

Q. Do you think a 90 per cent solution is correct? [186]

A. Well, this was a rebrining operation—just refilled to bring the fish more or less to the condition that the market demanded. That was the

(Testimony of John M. Kniseley.)

practice. Whether it was correct or not would depend upon what results they wanted.

Q. "What result they wanted" what do you mean by that?

A. The fish are sold subject to approval of the buyer and the intent there always was to make your fish look as good as you could, and that is what we did use.

Q. The 90 per cent solution. Well, what would have been the result, as you recall it, if you had used an 85 per cent solution?

A. I don't think there would have been so terribly much difference.

Q. Supposing it was 80 per cent?

A. Well, as you go down the scale you lose your preservative action.

Q. You lose your preservative action the more you go down from 90? A. Yes.

Q. Ninety per cent, would you say was an average mild cure?

A. I think it was hard to get it saturated and 90 per cent was good enough and that is what we used.

Q. As a matter of fact, are you familiar with the [187] mild cured salmon that is being put up in Alaska; did you examine any of that?

A. Yes, I have examined it.

Q. Do you know what percentage solution they used in the mild cured salmon?

A. I don't ever recall rebrining mild-cured salmon.

Q. Mr. Kniseley, do you ever put more than 90 per cent—say 92, 93 or 95 or 100 per cent in herring? A. I don't recall.

Q. In speaking of the cooling process or—I think what we really mean is the other way around—the absorption of heat. You mentioned several times about barrels reaching their equilibrium with the surrounding temperature.

How long, in your opinion would it take a barrel that was, say, 65 degrees inside to reach 70 degrees if it was kept in a room at 70 degrees?

A. I just simply can't answer that question without further qualification because it might never reach there.

Q. Well, then, it isn't a fact that a barrel of herring will always reach the surrounding temperature, is that right?

A. That is a fact; it will not always reach the temperature of its surroundings. [188]

Q. Let's get it this way. Whatever the process is, heat absorption or cooling, whichever way you want to speak of it, is that a slow process or rapid or how does it take place?

A. It is not such a terribly slow process. The elevation of the temperature may be very slow. If all you are getting is elevating the temperature by the difference between the amount put in and the amount lost, which the difference in some cases isn't anything. In some cases they reach equilibrium, oh, as much as five degrees below room temperature. Then the elevation of temperature would be in hundreds or maybe none at all. But

(Testimony of John M. Kniseley.)

if the relative humidity in the room rises so that the rate of evaporation decreases, then the elevation of temperature may be fairly rapid.

Q. One other point. You said the outside temperatures such as Weather Bureau Reports and what-not are temperatures taken in the shade.

Have you any ideas or do you know what the normal difference would be between that temperature taken in the shade and the temperature taken out in the sun on an ordinary clear sunny summer day?

A. That would depend entirely on what kind of a [189] thermometer you had. If you had a Mercury Thermometer with a bright shiny bulb, it might show 50 degrees. If you had an alcohol thermometer with a red bulb, then it wouldn't be nearly as much. If you had some other type of bulb, then the difference would be still different.

Q. What would you think would be the minimum difference? The maximum I take it is about 50 degrees with a mercury bulb. What would you think the minimum difference would be on any kind of thermometer?

A. That would depend entirely on how hard the sun was shining, the day of the year, the hour of the day; there are so many factors, that I can't answer.

Q. So, it would be considerably hotter, would it not? A. Outside than inside?

Q. No. In the sun as against the shade?

(Testimony of John M. Kniseley.)

A. I think in the sun is always hotter than in the shade, yes, sir.

Q. I know it is hotter; but I mean it would be a lot hotter, wouldn't it?

A. Again I can't answer. It would depend on the sun. In some places it would be 50 degrees.

Mr. Wakefield: That is all.

Mr. Hamlin: I have just one other question.

The Court: Is it only one question you wish to ask?

Mr. Hamlin: Yes, your Honor.

The Court: The Court permits you to ask one more question only.

Further Redirect Examination

By Mr. Hamlin:

Q. You said when you looked at this herring, some of it was of fair merchantable quality. Did this herring which you have identified as fair merchantable quality show any evidence of damage and, if so, what was it?

A. Yes, it did. Excuse me, I didn't hear the rest of it.

Mr. Hamlin: I asked "If so, what was it"?

The Court: There was a further part to the question.

A. (Continuing) The fat was somewhat eliminated on the fish. The fish were somewhat soft but not to the extent where they wouldn't be merchantable.

The Court: Does this question cause the other

(Testimony of John M. Kniseley.)

side to feel that a further question should be asked?

Mr. Wakefield: No, Your Honor.

The Court: You may be excused from the stand.

(Witness excused.)

The Court: Call the next witness.

Mr. Hamlin: Captain Perry.

The Court: Come forward.

L. C. PERRY,

called as a witness by and on behalf of Libelant, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Will you state your full name, please?

A. L. C. Perry.

Q. Where do you live, Captain Perry?

A. Seattle.

Q. What is your occupation?

A. I am a marine surveyor. [192]

Q. Will you state the experience you have had in the business of a marine surveyor and any other experience which may be pertinent thereto?

A. Well, I started to sea in 1913 as apprentice seaman and progressed—able seaman, able-bodied seaman, and was in the World War about 1917 in the United States Navy. I went back to the Merchant Marine, became a Mate and finally Master of Ships.

In 1930 I went with the Board of Marine Underwriters in San Francisco on station at Seattle as

(Testimony of L. C. Perry.)

a Marine Surveyor. I remained with them until 1946 when I opened my own office and became what is known as an independent surveyor.

Q. During this period from 1913 to the present time, have you been continuously connected with ships or have you been in some other business?

A. I have been continuously connected with vessels.

Q. Do you have any personal knowledge of salt herring?

A. Oh, just from the fact that being of Scandinavian extraction, we have had it at home for pickling purposes, that is about all.

Q. Have you ever prepared it?

A. Yes, I have prepared it personally.

Q. I will ask you whether on September 5, 1946 [193] and thereafter you surveyed an alleged cargo loss at Bell Street Dock consisting of a shipment of 1358 barrels of salted herring?

A. Yes. On that date there were only 971 on the dock but the total amount was that figure that you quote.

Q. Who requested you to make this survey?

A. James Farrell & Company of Seattle.

Q. Whose cargo was it, do you know?

A. It belonged to the Apex Fish Company.

Q. What time of the day did you go there to first start your survey?

A. I believe it was about 10:30 in the morning.

Q. Who else, if anyone were present at the time of your survey?

(Testimony of L. C. Perry.)

A. Well, during the course of the survey there were a number of persons but at the beginning Pete Wahl and I were there. In the afternoon Mr. Kniseley came and later on Mr. James Gow of Alexander Gow & Company came.

Q. Calling your attention to this portion of the shipment consisting of 971 barrels, did you look at each and every one of those and examine them?

A. Eventually we looked at each and every one of them.

Q. State how the examination was carried on of this 971? [194]

A. Well, Pete Wahl who did the physical work of opening them—he would open them and segregate them as to good or bad and fair and then we would go along and from personal observation we would note each barrel. Those that were unfit for human consumption or condemned, why, we reversed the heads of them and placed them on the dock. Those we thought had some value or could be sold for salvage we placed into the cold storage.

Q. Were you present when Mr. Kniseley made his temperature readings? A. I was.

Q. Will you describe, please, the actual physical condition of the herring which you observed on this occasion?

A. Well, some of it was in very bad shape. By that I mean that oil was standing on the top of the kegs; and upon handling the fish itself, the flesh of the fish would disintegrate which

(Testimony of L. C. Perry.)

showed us that that herring wasn't of any value. It also had a distinct odor so that we called it bad. Then that that the flesh had some firmness to it and there wasn't as much oil on the top of the keg, we would place that in another category, and that way we made different sets of it—bad and [195] fairly good, if you want to term it that.

Q. Do you recall how many barrels of this entire shipment were adjudged unfit for human consumption?

A. I don't recall offhand from memory. I have records of how many there were.

Q. Do you have the record with you?

A. I have.

Q. Of what does that record consist?

The Witness: What was the question previous to the last?

(Question repeated by the reporter as above recorded.)

Q. Do you recall how many barrels of this entire shipment were adjudged unfit for human consumption? A. Six hundred thirty-two.

Q. Where they made up of halves or quarters?

A. They were of halves and quarters.

Q. Do you have the numbers of each?

A. The halves show 198; the quarters 80.

Q. That is from one of the holds?

A. That is from number 4 hold. And 354 in number 3 hold.

The Court: Are those 354 in addition to the 632 you first mentioned?

(Testimony of L. C. Perry.)

The Witness: No. Those two figures make [196] the total of 632.

Q. (By Mr. Hamlin): Those 354 which you have mentioned from number 3 hold, were those halves or quarters?

A. 354 halves were ruined.

The Court: The 354 half-sized barrels found in number 3 hold were what?

The Witness: Ruined.

The Court: Damaged to the extent of being—

The Witness: Unfit for human consumption.

Q. (By Mr. Hamlin): Those, when added to the 278 you mentioned before, make up the total of 632, do they not?

A. Yes, that is correct.

Q. Did Mr. Gow examine those 632 barrels with you?

A. Yes. He examined right along with us.

Q. Did you and Mr. Gow discuss what should be done with them?

A. Yes, we discussed it.

Q. Did you come to any agreement in that respect?

A. Well, with these barrels that were ruined, we contacted the Sound Reduction Company to see if we could realize some value from the oil and meal but they were reluctant at taking them because they claimed [197] the salt would clog their machinery or something. Finally, we prevailed upon them to take them and we gave them the barrels as kind of an incentive to take them because if they didn't take them from us we would have to dispose of them and just thereby create

(Testimony of L. C. Perry.)

another expense which we were endeavoring to minimize.

Q. Do you have a record there of the temperatures which you and Mr. Kniseley took there that day?

A. Yes, I have the notes that I took on September 5th.

Q. Will you state the temperature you found in the barrels of herring in this 971 lot?

Mr. Wakefield: I think I could properly object to that unless he took the temperatures. Mr. Kniseley has already stated he took them. It is incompetent.

The Court: That objection is sustained without objection to your asking him what temperatures did he use or consider in connection with his inspection. He has used the figure—apparently an over-all figure which I would like broken down again for the convenience of making any notes.

I failed to get the last figure he used—nine hundred and some odd. I want to know what relationship that bears, if any, to the six hundred [198] fifty-two bad condition barrels first mentioned.

Mr. Wakefield: May I make a statement which I think would clear that up, your Honor?

The Court: All right, you may.

Mr. Wakefield: Number 3 lower hold had 971 barrels total in it.

The Court: Of which 354 were unfit for human consumption in accordance with this witness' statement.

(Testimony of L. C. Perry.)

Mr. Wakefield: That is correct.

Number 4 lower hold had the balance of the shipment.

The Court: Of the 632?

Mr. Wakefield: No. Originally there were loaded in number 4 hold 387. So the shipment consisted of 387 barrels in number 4 hold and 971 in number 3 hold.

The Court: Of this number of 387, how many, if any, were characterized by this witness as being unfit for human consumption?

Mr. Wakefield: 198 half barrels.

The Court: Of which 198 half barrels were unfit for food?

Mr. Wakefield: And 80 quarter barrels.

The Court: And 80 quarter barrels were unfit [199] for human food.

That answers my inquiry.

If there is anything else you wish the witness to state, I will hear him.

Q. (By Mr. Hamlin): Did you personally look at the thermometers which Mr. Kniseley used in taking the temperatures? A. I did.

Q. Is ask you again, then, what temperatures was found in the barrels which you so tested in this 971 lot in hold number 3?

The Court: If he can state the answer to that question within his present knowledge.

Mr. Hamlin: Yes.

A. On the original records from my notebook, it notes temperatures of 73 to 77 degrees Fahren-

(Testimony of L. C. Perry.)

heit. Mr. Kniseley was handling the thermometer and getting it full of fish gore and I was taking the notes. That is the way it worked.

The Court: These were the temperatures inside the barrels, is that right?

The Witness: That is correct, sir.

Q. (By Mr. Hamlin): What part did you take, if any, in [200] the measuring of the temperature within the lower number 3 hold of the Denali that day?

A. Well, Mr. Kniseley handled the thermometer. We both had flashlights and we both played it on the thermometer and read the figure "79 degrees Fahrenheit."

The Court: Where was that?

The Witness: In number 3 lower hold between the shaft alleys.

The Court: Was the temperature in number 3 lower hold between the shaft alleys?

The Witness: Yes, sir. That is where the cargo was stowed.

The Court: You may proceed.

Q. (By Mr. Hamlin): How long did it take you to conclude your inspection of the 971 barrels which came from lower hold number 3?

A. I think it was three or four days before we got the whole thing inspected.

Q. Upon the conclusion of your inspection of that portion of the shipment, are you able to state what you found with respect to the remaining 617 barrels after having ascertained that 354 of them

(Testimony of L. C. Perry.)

were unfit for human consumption; what was [201] the condition of those 617 barrels?

A. Well, they had some value and could be disposed of we thought, so we placed them into cold storage.

Q. You say "we". Now, who is "we"?

A. Mr. Gow and the people who were interested. We got the benefit of Pete Wahl's opinion and talked to Mr. Farrell and all concluded that was the best thing to do for the interests of all was to put them in cold storage, so they would not deteriorate any further until we could dispose of them if we were successful in doing so.

Q. Where were they stored in cold storage?

A. Bell Street Dock.

The Court: What number of barrels is mentioned in this statement or is referred to in this statement?

Mr. Hamlin: 617, your Honor.

Q. (By Mr. Hamlin): Why is it that you didn't make an inspection of the balance of the shipment which was in number 4 hold at that same time?

A. Well, after this herring was discharged from number 3 hold, we had a Maritime strike and the vessel was tied up due to that and it was, I believe, towards the end of the month before they went back to work [202] and discharged number 4 hold.

Q. You did make a survey of the balance of the shipment in number 4 hold, did you not?

A. Yes, sir.

Q. Do you recall when that was done?

(Testimony of L. C. Perry.)

A. Well, that was—I believe it was September 26th.

Q. Did anyone attend with you at that inspection?

A. I believe Mr. Gow was along on the dock. We were on and off together more or less.

Q. How did you examine that portion of the cargo?

A. Similar to number 3, by having the kegs opened and segregated. Pete Wahl would segregate them and then we would go along and inspect them on our own and confirm what he said. If there was some doubt, we would discuss it and finally come to a definite conclusion.

The Court: How many barrels were involved in this remainder of the balance in this number 4 hold which you inspected on September 26th?

The Witness: 387.

The Court: Were those then regarded as still fit for human consumption?

The Witness: No, sir. Of those, 198 half barrels were not considered fit for human consumption, which left 79 half barrels that were questionable [203] whether we could derive some salvage from them. Then there were 80 quarter barrels that were ruined and thirty that were questionable, giving us a total of 387 in the hold of which 278 were not fit for human consumption.

The Court: 278?

The Witness: Correct. There were 109 on which we had some question of whether maybe we could salvage them.

(Testimony of L. C. Perry.)

The Court: At this time Court will be in recess until 2:00 o'clock.

(At 12:10 o'clock, p.m., Wednesday, July 14, 1948, Court recessed to 2:00 p.m., in the United States Court House.) [204]

Seattle, Washington

July 14th, 1948, 2:00 o'clock, p.m.

(All parties present as before.)

The Court: The taking of testimony may be resumed in the case on trial.

L. C. PERRY

(Resumed)

Direct Examination—(Continuing)

By Mr. Hamlin:

Q. Where is number 3 hold located on the S.S. Denali?

A. Number 3 hold is the hold just abaft of the engine room compartment.

Q. Where is number 4?

A. It is abaft of number 3 or the last hold.

Q. Directing your attention to the entire shipment of 1358 barrels of salt herring involved in this action, I ask you if any portion of that entire shipment was found by you to be in an undamaged condition? A. No, it was not. [205]

Q. Did you observe any difference in the condition of the herring found in hold number 4 from that in number 3?

A. On the average, and the impression that I

(Testimony of L. C. Perry.)

got, was that number 3 was a little more damaged than we saw in number 4.

Q. Captain Perry, would you state your opinion as to specifically what condition caused the damage which you found in this entire shipment?

Mr. Wakefield: I object to that first on the ground that the witness has not been shown to be qualified to express an opinion as to the cause of damage to the herring. Well, that is my objection.

The Court: The objection is sustained with leave to further inquire of the witness' qualifications.

Q. (By Mr. Hamlin): What has been your experience with the inspection of cargoes of salt herring prior to that as to which you have just testified?

A. Well, I have inspected some but specifically I couldn't tell you when.

Q. I think you testified that some of these barrels had a layer of oil on the top of the barrels.

A. That is correct. [206]

Q. I am asking you to state just yes or no, if you know, what it is that causes oil to rise to the top of the barrels of salt herring.

Mr. Wakefield: 'The same objection, if the Court please.

The Court: The objection is overruled.

A. Yes.

Q. (By Mr. Hamlin): What particular information in your possession enables you to say that you know what causes oil to rise to the top of the barrels of salt herring?

(Testimony of L. C. Perry.)

A. Well, it is just the simple fact that oil will go on top of water and the oil in the barrel will rise to the top.

Q. Is oil normally floating on the top of the barrels of salt herring in good order?

A. No, it is not.

Q. Where is the oil located within the barrel?

Mr. Wakefield: Objected to, your Honor.

The Court: State all of the conditions in the question. Subject to that qualification of the question, the objection is sustained.

It is obvious to the court that you have not stated all of the conditions which you have in mind.

Q. (By Mr. Hamlin): Do you know where the oil came from that was floating on the top of the barrels? A. It came from the fish.

Q. Do you know what would cause the oil to leave the fish and go into the water?

Mr. Wakefield: I object to that on the ground the witness has not been shown to be qualified to testify.

Mr. Hamlin: I am asking him if he knows.

The Court: The objection is overruled.

The answer should be yes or no—whichever is the fact.

A. Yes.

Q. (By Mr. Hamlin): Upon what information do you base your reply that you do know what causes the oil to leave the fish and enter the water in the barrel?

A. Experience with this commodity.

(Testimony of L. C. Perry.)

Q. What is that experience?

A. Oh, I have inspected some barrels that are good herring and some that are bad. That which is good hasn't the oil on it and that which was bad had the oil on the top of it.

Q. Have you ever definitely ascertained the causes in [208] these prior occasions that you have now referred to which made the oil come to the top?

A. Yes.

Q. Will you please state what causes in your experience have made oil leave the fish and come to the top of the barrel?

Mr. Wakefield: That is objected to, if the Court please. It appears from this witness' testimony that he has inspected some herring—how much he hasn't said—that good herring doesn't have oil and bad herring does.

Now, as to the cause of the oil being there or the cause of the oil coming out, there is no qualification shown at all.

The Court: The objection is overruled.

(Last question repeated by the reporter.)

A. Heating of the fish.

Q. (By Mr. Hamlin): Have you ever observed any other cause which caused the oil to leave the fish and come to the top of the barrel?

Mr. Wakefield: The same objection.

The Court: Overruled.

A. Just heating. [209]

Q. (By Mr. Hamlin): I say, have you ever observed any other cause, other than heat?

(Testimony of L. C. Perry.)

A. No.

Q. Have you computed the value of the shipment of 1358 barrels involved herein, assuming it to have been in good order and condition?

A. I have.

Mr. Wakefield: That is objected to as repetition and the witness not having been shown to be qualified to testify as to value.

Mr. Hamlin: I merely asked him if he has computed.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: The objection is overruled.

Q. (By Mr. Hamlin): What values did you use in computing such entire value?

Mr. Wakefield: I object to that. I can't see how that is evidence of value, your Honor.

It is not shown that he has ever sold a barrel of herring or knows anything about how much it is worth.

The Court: The objection to the form of the [210] question is sustained with leave to inquire what elements, if any, are concerned in making the computation—what elements of value.

Mr. Hamlin: I might state that the only reason I am doing this is to get in one place a compilation and right straight down the record for the convenience of the court instead of having to total these things up. I have asked him only what figures he had used in arriving at this total value.

The Court: The objection to the form of the

(Testimony of L. C. Perry.)

question last put is sustained and the ruling will stand.

Q. (By Mr. Hamlin): Are you now today familiar with the fair market value of salt herring in good order and condition on September 4th, 1946, ex dock at Seattle, Washington?

A. I am by referring to my records.

The Court: In that connection, the court would be interested to know when the records were made and for what purpose they were made.

Q. (By Mr. Hamlin): You have referred to certain records. I will ask you now when you made such records.

A. Well, it was actually typed on February 3rd.

The Court: What year?

The Witness: 1947.

A. (Continuing): And through my penciled notes in my notebooks; the notes were made at the time of the survey, that I have all the records in the case.

Q. (By Mr. Hamlin): What investigation did you make upon which to base your finding as to such fair market value on the date of that?

A. I inquired of the people who handled this commodity and compared their prices to see if one was the same as the other, and it seems as though there was an established set price at that particular time for different sizes of barrels and quarter barrels.

Q. Of how many different people did you inquire at that time? A. Three.

(Testimony of L. C. Perry.)

Q. Who are they?

A. Mr. Ellis of James Farrell & Company; Mr. Jacobs of Oxenburg Brothers, and Pete Wahl.

Q. What is Oxenburg Brothers?

A. They are dealers in salt fish, also for salt herring.

Mr. Wakefield: May I interrupt and ask Counsel: Are you merely trying to get before the [212] Court what is shown on the Captain's survey report as to the total amount of damage?

Mr. Hamlin: That is right.

Mr. Wakefield: Read it. I will agree to it as being shown on the Survey Report.

Mr. Hamlin: Very well. The computation of value is as follows:

“110 quarter barrels of medium at \$13, \$1,430; 119 half barrels large at \$23, \$2,737; 1129 half barrels medium at \$21, \$23,709; total value of shipment, \$27,876.”

The Court: Do counsel on both sides in the case among themselves know whether or not this survey report is ever going to be offered in evidence or is going to be attempted to be put in evidence or not?

Mr. Hamlin: I do not intend to offer it, your Honor.

The Court: Proceed, then. It seems like the time we have taken up in getting this bit of information out of this witness has been unduly lengthy, to the court.

Q. (By Mr. Hamlin): Do you know how much was received [213] from the sale of this shipment?

(Testimony of L. C. Perry.)

A. Yes.

Q. How much was it?

A. The total received from the sales was \$10,-
329.

Q. Did you have any personal connection with the charges—the authorization of charges which were incurred by this shipment in inspection, repair, culling, segregation and storage?

A. Yes.

Q. Did you discuss such charges with Mr. Gow?

A. I believe we did.

Q. Before they were incurred?

A. No, I wouldn't say before they were incurred but when they were incurred. We consulted to see if they were fair and reasonable.

Q. Have you tabulated the expenses which were incurred by this shipment after it was landed on September 4th, 1946? A. I have.

The Court: Have you instructed the witness, Counsel, not to include items which yesterday were discovered to be not includable?

Mr. Hamlin: Yes, your Honor. The list which I will ask him to read is, so far as I know, the correct one, your Honor. [214]

Q. (By Mr. Hamlin): Will you state each charge which was incurred by this shipment, the amount and the reason for it, please?

Mr. Wakefield: That is objected to, if the Court please, unless it is further qualified to be charges which the libelant contends were incurred as a result.

(Testimony of L. C. Perry.)

The Court: I assume that counsel inquiring of the witness has to try to avoid leading questions and I believe that the objection should be overruled.

Mr. Wakefield: The part of the question I objected to was that his question assumes that these are the part of the charges attributable to this damage.

The Court: The Court has already cautioned counsel inquiring to use his best good faith to try not to have included those items which yesterday were discovered by counsel inquiring not to be included by him.

Proceed.

A. Peter Wahl inspecting number 3 hold shipment, \$99.00; Peter Wahl inspecting number 4 hold shipment, \$54.00; Port of Seattle bills, extra wharfage and handling to cold storage, 971 half barrels, \$153.59. [215]

Q. (By Mr. Hamlin): Would you read the date of each as you go along?

A. That was 9/4/46. That is September 4th, 1946. Then bill number "B97648, receiving in cold storage September 4th, 1946, \$258.72."

Mr. Wakefield: May I interrupt and object further, your Honor. This is all in evidence. The actual bills have been offered as an exhibit and admitted.

I object to it as repetition. It doesn't add a thing to what is before the court.

The Court: What is the purpose?

(Testimony of L. C. Perry.)

Mr. Wakefield: He is just reading a list of bills and they are all in evidence.

The Court: What is the purpose?

Mr. Hamlin: The purpose is simply to correct in the record an error which was unfortunately injected into the case yesterday.

The Court: Very well. Do so as briefly as possible. Couldn't you get him to state the totals and then, if opposing counsel on cross-examination is interested on the various items—

Q. (By Mr. Hamlin): Would you then please state the total of the expenses which you were working on before [216] the objection was made?

A. The total amount of all expenses connected with this case is \$1706.92.

Mr. Wakefield: I move to strike the last part of the witness' answer—the words “in connection with this case.” That is a conclusion.

The Court: The objection is overruled. You may inquire on cross-examination as to his knowledge of that fact.

Mr. Hamlin: That is all.

Cross Examination

By Mr. Wakefield:

Q. Captain Perry, what time of day was it on the 5th of September, 1946, when you and Mr. Kniseley took the temperatures of the barrels of herring?

A. The barrels of herring? Oh, I would say approximately 2:30 p.m., on the afternoon of September 5th, 1946.

(Testimony of L. C. Perry.)

Q. About how many barrels did you open and examine at that time?

A. Well, there were opened by Pete Wahl a dozen or fifteen barrels, here and there, taken at random. [217]

Q. Did you say that the barrels were opened or that they did open them after you got there?

A. No. We had been opening them. I was there from morning on.

Q. Well, these 12 to 15 barrels that you examined and took the temperatures of, were they opened at that time or had they been previously opened?

A. No. Mr. Kniseley designated certain barrels he would like to have opened in addition to the ones that we had opened.

Q. And the ones that you took the temperature from were barrels that he designated and asked Mr. Wahl to open, is that correct?

A. That is correct.

Q. What type of barrels did he pick out; was there any particular type of barrel?

A. You mean as to size?

Q. No; as to condition?

A. Well, I don't know what prompted his judgment or why he selected certain barrels but he would say, "Well, open this one," and "Open that one."

Q. And as far as you recall, they all looked the same on the outside?

A. Yes; they were the same more or less.

(Testimony of L. C. Perry.)

Q. Was it after you took the temperature of the barrels [218] that you went down into the hold of the vessel? A. That is correct.

Q. Was the strike on at that time?

A. Yes, it was.

Q. Who was aboard the ship, if anyone?

A. There was a watchman.

Q. None of the crew were aboard?

A. No, sir.

Q. All of the lights were off, were they?

A. As I recall it, yes.

Q. I mean you had to use flashlights to go down in the hold? A. That is right.

Q. How was the temperature taken down in the hold? A. By a thermometer.

Q. And from what spot or location?

A. Oh, I imagine it was about the center of everything where we thought the cargo had been stowed as to height. We knew it was between the alleys but we didn't know just how high it went, so we tried to strike on the center of the lot.

Q. Did he hold the thermometer up in the air or down to the ground?

A. Just held it out.

Q. He just held it up in front of him? [219]

A. Yes.

Q. Did you examine number 4 hold when the herring came out on the 25th or 26th of September?

A. Yes, I examined it.

Q. Did you take temperatures?

A. No, sir.

(Testimony of L. C. Perry.)

Q. Did you take the temperature of any of the herring that was discharged from number 4 lower hold on September 25th? A. I did not, no.

Q. Did anybody else take any temperature?

A. Not to my knowledge.

Q. Why was that; if you were inspecting this fish, number 4 lower hold, and took temperatures on the 5th in respect to number 3, why didn't you take the temperatures on the 25th?

A. Well, in my mind it wouldn't tell you much because the fish had laid in number 4 hold for some twenty odd days more. It wouldn't give you a true picture of anything except what the temperature of the fish was then.

Q. But you thought that such a temperature wouldn't be of any value for purposes of suit or otherwise?

A. We had found the fish in number 3 was damaged. When we opened the kegs that came out of number 4, we found [220] them damaged also. And such a time had elapsed, that, to my mind, it didn't serve any useful purpose.

Q. These charges, Captain Perry, did you approve all of those charges in your capacity as a surveyor? A. I did.

Q. I understand you to say that they are all attributable to the handling of this fish after it was removed from the ship? A. Yes.

Q. What charges would the owner of the fish normally have if it had been sound fish and he had had to discharge it from the ship and handle it?

(Testimony of L. C. Perry.)

A. Well, that would depend entirely upon his sales, I presume. I don't think I could answer that question.

Q. In other words, these charges totaling \$1706.92 are all of the charges that were incurred after the fish left the ship except for that one item that was stricken out yesterday?

A. I don't know. The only think I can say is that these charges that I have approved are those charges that relate to the cargo and were necessary on account of it being in its damaged condition. If there were any other charges, I don't know anything about them.

Q. Well, you have wharfage and handling on sound fish, [221] don't you, Captain Perry?

A. I beg your pardon?

Q. I say you have wharfage and handling charges on sound fish, don't you?

A. Sometimes, yes.

Q. And you have storage charges on sound fish, do you not?

A. If it is going into storage, correct.

Q. You have inspection charges on sound fish, do you not?

A. Well, you don't have the exhaustive inspection that you had here.

Q. I know. But all herring is inspected when it arrives here regardless of damage?

A. Well, presumably.

The Court: How would the item here charged for inspection compare with the ordinary inspec-

(Testimony of L. C. Perry.)

tion charge?

The Witness: I believe this charge is higher in view of the fact that we found the damage and therefore we had to go into every keg. Where, if you take kegs at random and find no damage, then your inspection is held to a minimum and your charge is a minimum charge.

The Court: Are you familiar with those minimum charges? [222]

The Witness: I am not, sir.

The Court: Proceed.

Mr. Wakefield: That is all, Captain.

The Court: You may be excused, Captain.

(Witness excused.)

The Court: Call the libelant's next witness.

Mr. Hamlin: The libelant rests, your Honor.

The Court: The libelant rests. The respondent may now proceed.

TESTIMONY ON BEHALF OF RESPONDENT

Mr. Wakefield: If the Court please, at this time the libelant having rested its case, the respondent, United States, challenges the sufficiency of the evidence and moves for a dismissal of the libel on the ground that the evidence has failed to prove any negligence or fault of the respondent or of the vessel resulting in damage.

The libelant having proceeded with its case to prove the condition of the fish and an attempt to prove the cause of damage has failed to introduce any evidence showing that the heat— [223] or that

heat resulted from the ship during the time the herring was aboard the ship and in transit from the point of loading to the point of discharge. And there being no evidence to render the respondent liable on the basis of negligence or improper stowage or unseaworthiness or any other ground, we submit to the court that libelant has failed to sustain the burden of proof and that the libel should now be dismissed.

The Court: The court is ready to rule upon that. The challenge is overruled and the motion is denied.

The respondent may further proceed.

OPENING STATEMENT ON BEHALF OF RESPONDENT

Mr. Wakefield: If the Court please, the position of the respondent in this case is that no damage resulted to this herring because of any negligence or fault of the respondent or the vessel or of its officers or crew and that the cargo was loaded, stowed and carried in the regular, ordinary manner and out-turned in an unfit condition due to either inherent vice of the commodity, it having been insufficiently cured, or having been exposed [224] to the sun at the cannery or kept too long at the cannery or any number of causes which have already appeared in the evidence and many which will appear in the respondent's case.

The respondent's evidence will show that this shipment consisting of 1358 barrels was loaded

aboard the Denali on Voyage 55 of that vessel at Port Wakefield, Alaska, on August 23rd, 1946. Nine hundred seventy-one barrels were placed in number 3 lower hold in the center of the hold between the shaft alleys and three hundred eighty-seven barrels were placed in number 4 lower hold in the same location, namely, between the shaft alleys and the center of the hold.

I might say that the shaft alleys spoken of frequently refer to twin screws. The Denali is a twin screw vessel having shaft alleys from the engine room to the propeller at the stern. These shaft alleys are humps in the hold, covered with steel bulkheads, the same as any other steel bulkhead, and inside of the shaft alleys is the propeller shaft. So when we say "between the shaft alleys," we have reference to that area of the lower hold which is situated between these two steel coverings that extend over the propeller shafts. [225]

At the time of loading it at Port Wakefield, Mr. Wakefield—who has testified as a witness—was present and knew the cargo was going into number 3 and number 4 holds. He had made his previous shipment not more than thirty days prior to this one in question from Port Wakefield, which was carried in number 3 lower hold and consisted of over nine hundred barrels of salt herring. No refrigeration or cool room storage is requested nor does the contract between the parties call for anything other than ordinary stowage, and that has been admitted by the libelant in answer to interrogatories.

There is no issue in this case as to cold storage or cool-room storage. We have here nothing more than ordinary stowage.

After the vessel had loaded at Port Wakefield, it proceeded to Port Vita which is right close by—a matter of one-half hour's traveling, a very few miles, where a quantity of barrels of herring were loaded in number 1 lower hold.

At the time the Denali came up to the Port Wakefield dock the purser — who will testify — observed that the barrels of herring were stowed out on the face of the dock. He estimated about four hundred—that they were uncovered, that they [226] were dry and that they were warm. He touched them with his hands and will testify that these barrels of herring were dry and were warm and were not covered with anything whatsoever nor had they been wetted by water or anything else.

The balance of the shipment, as has been admitted, was stowed just inside the door of the plant on the face of the dock adjacent to where these barrels were sitting out in the bright sun.

The Port Vita shipment, the evidence will show, was covered and wet—was being wetted—and the barrels were wet at the time the vessel came along and when they were loaded.

The Port Vita shipment in number 1 lower hold was discharged on September 25th or 26th, after the strike, and out-turned without any damage.

After the vessel left Port Vita it proceeded to several other canneries, and number 3 hold was entered and loaded into as late as August 26th,

I believe, at which time the Chief Officer was down there climbing around over the shaft alleys and in the hold and he testifies that the hold was normal and cool.

Number 4 hold was entered as late as August 26th, at another cannery where fish was entered into [226-a] number 4 hold and the same thing was true, that the hold was normal and cool at that time. The vessel arrived at Seattle on September 3 about 6:00 p.m., and discharged passengers, baggage and mail and express.

On September 4th, the following day, the vessel proceeded to the Bell Street Terminal where the nine hundred seventy-one barrels of herring in number 3 hold were discharged, that being completed shortly after midnight on the 4th.

The general strike of sailors, longshoremen and others started early on the morning of the 5th and the Denali, along with other ships, was shut down.

The evidence will show what the shutting down process is, and this was completed at 10:30 p.m., on the morning of the 5th, at which time the Denali was completely shut down, closed up tight, the fans off and everything secured for the strike.

The strike continued until the 25th at which time there was a break for five days, namely, from the 25th to October 1st there was no strike. That was the only 5-day perior or the only period from about May until December that there was not some kind of a strike. And the balance of the herring [227]

in number 4 lower hold was discharged on that date, when the strike terminated.

The evidence will show that number 3 and number 4 lower holds of the Denali are regular, usual and customary holds, that they are not hot holds, or warm holds. The evidence will show that herring shipments are and have been frequently carried in these holds, that it is a regular, proper and customary place to carry herring.

In addition the evidence will show that on north-bound trips from Seattle to Seward, perishable cargoes are stowed in number 3 and number 4 holds—citrus fruits, eggs, candy, lard, apples, tomatoes and commodities of that kind are successfully carried in number 3 and number 4 holds.

The evidence will also show that nothing occurred on this voyage which was out of the ordinary and which accounted for any heat in either hold. There was no accident.

There was no change in conditions, no act of any kind which would account for anything other than the ordinary conditions to be encountered.

The respondent therefore will prove by its evidence that this herring was afforded the ordinary stowage which had been given to herring on [228] many similar voyages and that nothing occurred aboard the ship to account for any heat or unusual conditions on this particular voyage.

In addition there will be evidence of persons qualified to testify which in my opinion casts considerable doubt upon the sufficiency of this cargo at the time it was loaded to be successfully carried

and also whether or not it might not have been in a damaged or bad condition at the time it was actually loaded aboard the ship.

I would like to begin by offering in evidence certain of the interrogatories—answers to interrogatories propounded by the respondent to the libellant.

In that connection I would like first to offer Interrogatory Number 7. Interrogatory Number 7 reads as follows:

“If barrels were kept or stored in a warehouse or covered space before loading, state how many were so stored and for how long and what care or protection was afforded the barrels during that time?

“Answer: All of the half barrels mentioned in the Libel were stored in Libellant’s plant [229] under cover until two or three days before the Denali arrived on August 23rd, 1946 at which time something less than 400 of such half-barrels were removed to the open dock. Such half barrels were stored for varying lengths of time. In general, the number packed on each day as stated in Libellant’s Answer to Interrogatory Number 1 less the twenty per cent shrinkage were placed in said storage approximately ten days after processing was started. No particular care or protection was given or required by these barrels in covered storage as the weather was cool and conditions in all respects normal.”

In that connection, the respondent desires to note for the record and call to the attention of the

Court the fact that Mr. Wakefield has already testified by way of amendment to this answer that the barrels on the dock were there five or six days before the ship arrived whereas this answer states two or three days.

Respondent next would like to offer in evidence Interrogatory Number 13 and the Answer. The interrogatory is as follows: [230]

“Question: In connection with packing or processing salt herring, state how long the completed product is supposed to remain sound after being packed and under what specific conditions?

“Answer: Under cool-room storage a barrel of salt herring will remain in good condition indefinitely. At ordinary room temperatures of around 70 degrees, libelant does not believe it would remain sound for longer than one week.”

Next, respondent would like to offer Interrogatory Number 14 reading as follows:

“Question: Does the shipment of salt herring from Alaska to Seattle require cold storage or cool-room storage or is it desirable or requested?

“Answer: The shipment of salt herring from Alaska to Seattle does not require cold storage or cool-room storage nor is it desired or requested by libelant. Any ordinary cool hold of the ship not containing steam pipes or bulkheads adjoining the engine [231] room or containing steam pipes has been found satisfactory in Libelant’s experience.”

I would like next to offer in evidence Interrogatory Number 16 reading as follows:

“Question: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage?

“Answer: Libelant believes that the subjection of salt herring in barrels to heat up **70 degrees** for one week would damage it and render it unfit for food.”

I would next like to offer in evidence Interrogatory Number 17, reading as follows:

“Question: State the maximum daily temperatures at Port Wakefield, Alaska, between August 1, 1946 and August 24, 1946 and state whether on each day it was clear, cloudy or [232] rainy?

“Answer: Libelant kept no record and cannot answer Interrogatory Number 17, except that the weather was the same as usually encountered at Port Wakefield during the season in question. At the request of libelant the United States Department of Commerce, Weather Bureau, has furnished a statement of weather conditions at Kodiak, Alaska, the nearest point where weather observations are made at Port Wakefield, Alaska. Copies of this document and the explanatory letter of the Weather Bureau are attached hereto and incorporated in this answer by reference.”

I believe the letter and Weather Bureau record should be put in evidence. I will ask counsel if he has the original of that or one loose copy so I won't have to take my file apart?

Mr. Hamlin: I have it here. (Document handed to Mr. Wakefield by Mr. Hamlin.)

Mr. Wakefield: I ask that this be marked as an exhibit.

If the Court please, I have a deposition [233] which I wish to read next and in that deposition are exhibits marked A-1 to A-5, inclusive. I am wondering if this exhibit which I am now referring to might not be marked A-6?

The Court: Have you any others to be appropriately marked, in your opinion, smaller in identifying number?

Mr. Wakefield: The deposition has exhibits "A" to "A-5", inclusive, attached to it which will be offered.

The Court: This exhibit has not been previously referred to by any other number in the deposition or otherwise?

Mr. Wakefield: No, this one has not.

The Court: The Exhibit Number A-6 will be assigned to this particular exhibit.

(Letter and meterological data marked Respondent's Exhibit A-6 for identification.)

Mr. Wakefield: I offer Respondent's Exhibit A-6 in evidence, if the Court please.

Mr. Hamlin: No objection.

The Court: Admitted.

(Respondent's Exhibit A-6 received in evidence.) [234]

Mr. Wakefield: I would like to now request the publication of the deposition of Arney Burns, a witness for respondent.

The Court: Is there any objection?

Mr. Hamlin: No objection.

The Court: Are there any other depositions to be published and read besides this one?

Mr. Wakefield: That is the only deposition, your Honor.

The Court: What is the name of the witness?

Mr. Wakefield: Arney Burns, Chief Officer of the Denali.

If the Court please, the original does not seem to be on file. I have a signed copy and Mr. Hamlin has a signed copy. I don't know what happened to the original.

The Court: I believe that the Court is going to have to make some ruling for future cases which Counsel in similar situations may not entirely approve of. But it seems that the result of counsel's work in some of these cases is becoming less accurate and more careless all of the time.

This is obviously an oversight by counsel in the case. I do not like for counsel to feel that they can keep on perpetuating such negligent practices.

In the future I ask you kindly to take such measures as will insure against a result of this sort.

Proceed. Is there any objection to reading the deposition?

Mr. Hamlin: None, your Honor.

The Court: What copy is it that is going to be offered or used as an official copy for filing?

Mr. Wakefield: I would like to offer the copy I have which is a duplicate original, signed by the Notary.

The Court: I now have in my hands a copy of this deposition. When counsel are ready, they may proceed.

Mr. Wakefield: Under the circumstances, I wonder if the court would object to Counsel using that copy of the deposition?

The Court: Everyone except the trial judge will now use copies of the deposition.

Mr. Wakefield: I am very sorry about that, your Honor. I thought the original was filed.

The Court: Of course, you should have seen about that before the case was started.

Mr. Wakefield: I will ask that Mr. Crutcher take the stand and read the answers while I read the [236] questions.

(Whereupon, Mr. Wakefield, Counsel for the Respondent, read the questions of the deposition of Mr. Burns, and Mr. Crutcher, Counsel for the Respondent, read the answers of the deposition referred to as follows:)

ARNEY BURNS,

called as a witness on behalf of Respondent, having been first duly cautioned and sworn, testified by deposition DeBene Esse as follows:

Direct Examination

By Mr. Wakefield:

“Q. Will you state your name, please?

“A. Arney Burns.

(Deposition of Arney Burns.)

“Q. What is your occupation?

“A. At the present time, chief officer.

“Q. On what ship? “A. The Reef Knot.

“Q. Mr. Burns, are you about to leave on a voyage [237] of the Reef Knot for some time?

“A. Yes, sir.

“Q. Where are you going?

“A. Nome, Alaska.

“Q. When are you leaving Seattle?

“A. Tomorrow, June 16, 1948.

“Q. How long will you be away on this voyage to Nome? “A. About two months.

“Q. Were you chief officer on the Denali in August and September of 1946, on Voyage Number 55? “A. Yes.

“Q. On the voyage, which I will refer to as Voyage Number 55, did you stop and take on some barrels of herring at Port Wakefield, Alaska?

“A. Yes.

“Q. As Chief Officer of the Denali, what were your duties, generally, with respect to the loading of cargo?

“A. First of all, to see that the holds were all clean, and in good condition to receive cargo. Just supervising the loading or discharging, and seeing that the cargo has [238] proper stowage and proper handling, and no damage—to get no damage when you are loading and discharging.

“Q. On this occasion, on Voyage Number 55, when did the Denali arrive at Port Wakefield?

“A. May I look at the record?

(Deposition of Arney Burns.)

“Q. Yes. I will hand you the log book, which I will ask to have marked as Respondent’s Exhibit A-1—

“(Log book marked for identification Respondent’s Exhibit A-1.)

—and ask you if this is the original log book of the Denali for Voyage Number 55? “A. Yes.

“Q. By referring to the log book will you tell us when the Denali arrived at Port Wakefield?

“A. We arrived in Port Wakefield August 23rd, at 11:55 a.m.

“Q. By what time had you completed loading and sailed from Port Wakefield?

“A. 8:12 a.m., on August 24, we left Port Wakefield.

“Q. The entry is in that log book, Mr. Burns, I note run for twenty-four hours, do they?

“A. Yes. [239]

“Q. I was just looking at that, and the times beyond 12:00 noon, are shown as 13, 14, 15, etc.?

“A. Yes.

“Q. This is 11:58. Is that p.m., or a.m.?

“A. That is apparently a.m.; 11:58 a.m., arriving:

“Q. I say, do the entries run up to 2400?

“A. Yes.

“Q. At the time the Denali arrived at Port Wakefield, what if anything can you tell us about the barrels of herring, and where they were stored at the cannery or saltery?

(Deposition of Arney Burns.)

“A. Part of the shipment was stowed outside, on the dock; and the other part, or part of it, was stowed inside, in the warehouse.

“Q. Is this a small dock or a large dock?

“A. A small dock.

“Q. Where was the part of the shipment that was stowed out on the dock, with reference to where the ship landed?

“A. Well, it was stowed either abreast of number 3 and number 4 ahead there. That is about the length of the dock. In the first place, on that short dock, the barrels were near the face of the dock. Very near. About outside, 10, approximately. [240]

“Q. Ten feet from where the ship landed?

“A. Approximately.

“Q. This warehouse that you speak of, where is that located with respect to the place where the barrels that were out on the dock were?

“A. Well, it was directly behind, to a certain extent—directly behind the dock there. There is a door leading in there from the dock, and a big door there, and inside there is a warehouse.

“Q. How far back from the face of the dock, approximately, would you say the warehouse begins?

“A. It is pretty hard to say. About thirty feet, probably.

“Q. These barrels of herring which were stored outside, on the face of the dock, as you have just testified, what did you observe as to the condition

(Deposition of Arney Burns.)

of those barrels, as to whether they were covered or uncovered, or wet or dry, or what not?

“A. They were uncovered, and dry.

“Q. Do you recall anything as to the condition of the barrels that were inside of the warehouse, as to whether they were covered or [241] uncovered, or wet or dry?

“A. I do not remember that.

“Q. Mr. Burns, have you had considerable experience on ships in Alaska, particularly with respect to loading barrels of herring? I say, have you had considerable experience in Alaska, on board ships, particularly with reference to loading barrels of herring?

“A. Yes. We do that more or less every trip on the summer voyages.

“Q. How long have you been an officer on Alaska boats? “A. Seven years.

“Q. Has it been customary in your experience to bring barrels of herring from Alaska to Seattle? “A. Yes.

“Q. What has been your experience, Mr. Burns, in loading barrels of herring on other occasions, as to the condition of the barrels, as to whether they are covered or uncovered, or wet or dry?

“A. As a rule they usually are uncovered, at most of the places. At some places they have like what we call an overhang, an overhang like [242] a bridge, and at Port Vita they have sufficient overhang there, and they usually keep it under cover there. I assume that is to protect it from the weather.

(Deposition of Arney Burns.)

“Q. What can you say with respect to whether the barrels as you have observed them at these other places are wet or dry, or what condition they were in?

“A. Naturally, they would not be wet if it is not raining. If it is dry weather they would naturally be dry, also.

“Q. Did you have occasion on this particular instance of loading herring at Port Wakefield to look at these barrels, or touch them or feel them, and can you tell us whether or not they were warm or cold, or what their condition was?

“A. Personally not.

“Q. What was the general condition of the weather at that time, if you remember?

“A. At that particular time the weather was unusually warm for Alaska. That is, it was warm weather.

“Q. How about the weather generally, as you recall it, on that voyage, not only at Port Wakefield, but three or four or five or six days each [243] way from there? If you recall.

“A. Well, previous to arriving at Port Wakefield we came from Seward. I might have to refer to the log book. I do not quite recall that.

“Q. You can refer to the log book if you do not recall.

“A. (Witness refers to log book). From August 19th, up to arriving at Port Wakefield, the temperature ran all the way from 56 up to 63. Various temperatures.

(Deposition of Arney Burns.)

“Q. In your experience is that average, or would that be warm weather for Alaska at that time of the year?

“A. Well, I would consider it warmer than average.

“Q. How about the balance of the ship, Mr. Burns, from Port Wakefield, down to Seattle? What do you recall as to the weather, or what does the log book show?

“A. According to the log book the temperature was somewhat less than that after leaving Port Wakefield. The temperature was somewhat less, according to the log book.

“Q. You do not show daily temperatures, or temperatures on each watch, in the log book, do you?

“A. I note that in some places they have, and other [244] times they have not, but as a rule there is for each one.

“Q. And those temperatures are recorded under the heading ‘temperature’? A. Yes, sir.

“Mr. Wakefield: I will ask that this group of four papers, entitled ‘Hatch List,’ be marked as Respondent’s Exhibit A-2.

“(Four papers marker ‘Hatch List,’ marked for identification, Respondent’s Exhibit A-2.)

“Q. Mr. Burns, handing you this group of four papers, fastened together, and marked Respondent’s Exhibit A-2, and each being headed ‘Hatch List,’ will you state what they are?

(Deposition of Arney Burns.)

“A. This shows the correct stowage of every cargo loaded into the ship.

“Q. Did you prepare those documents yourself?

“A. I prepared them and gave them to the purser.

“Q. Have you signed each one of those four papers? A. Yes.

“Q. Do you identify those signatures as your own, ‘A. E. Burns’? A. That is correct. [245]

“Q. Referring to Respondent’s Exhibit A-2, will you tell us where the herring loaded at Port Wakefield was stowed aboard the Denali, on Voyage 55, on August 27, 1946?

“A. In Number 3 lower hold. The center of the lower hold, it should be.

“Q. How many barrels?

“A. 971 half-barrels.

“Q. 971 half-barrels in Number 3 lower hold, center? A. Yes.

“Q. And where else?

“A. The center of Number 4 lower hold.

“Q. What was stowed there?

“A. 387 barrels.

“Q. Can you tell where they were stowed in Number 3; first, with reference to the shaft alleys in Number 3 lower hold? A. Yes.

“Q. Where were they stowed with reference to the shaft alleys in Number 3 lower hold?

“A. They were stowed between the two shaft alleys.

(Deposition of Arney Burns.)

“Q. What are those shaft alleys, Mr. Burns?

“A. That is the housing for the shaft, the propeller shaft. [246]

“Q. What is this housing, so-called, made of? What kind of a housing is it?

“A. It is more or less a half round steel housing.

“Q. And the Number 3 lower hold space between the shaft alleys is a space on the floor of Number 3 lower hold which is situated between those two housings, is that correct? A. Yes.

“Q. How were those 971 barrels stowed in Number 3 lower hold?

“A. First, there was light dunnage down in the bottom, on the deck. Then the barrels were on end, one tier complete.

“Q. A full tier all over the hold?

“A. Yes. Then there was dunnage, another layer of dunnage on top, then another tier completely full, and so on.

“Mr. Wakefield: I will ask that this document entitled ‘Cargo Stowage Plan’ be marked as Respondent’s Exhibit A-3.

“(Cargo Stowage Plan marked for identification as Respondent’s Exhibit A-3.)

“Q. Mr. Burns, handing you this document entitled ‘Cargo Stowage Plan,’ which has been marked [247] Respondent’s Exhibit A-3, will you tell us what it is?

“A. That is the cargo plan that shows different lots of cargo loaded into the ship.

(Deposition of Arney Burns.)

“Q. Did you prepare this stowage plan?

“A. Yes.

“Q. Does it show the stowage location of the 972 barrels in Number 3 hold, at Port Wakefield?

“A. Yes.

“Q. And does it also show the other two lots of herring loaded at Port Wakefield in Number 4 lower hold? A. Yes.

“Q. Just so we can understand it, will you indicate on that exhibit with a pen—I note there being no other pen marks on the exhibit—just mark with a pen the section of Number 3 lower hold where the herring was stowed between the shaft alleys? A. Shall I mark it ‘X’?

“Q. Just outline it, the section of Number 3 lower hold between the shaft alleys where these 371 barrels were stowed.

“A. Yes. (Witness indicates on exhibit.)

“Q. And also, in Number 4 lower hold, mark the [248] space where the lots of 110 quarter barrels and 277 half-barrels were stowed, from Port Wakefield?

“A. Yes. (Witness indicates on Exhibit A-3.)

“Q. Those two outlines that you have drawn on Respondent’s Exhibit A-3, in Number 3 and Number 4 lower holds, represent the spaces where the Port Wakefield shipment was stowed on the Denali, on Voyage 55? A. That is correct.

“Mr. Wakefield: I will ask that this blueprint drawing entitled ‘Hold. SS Denali’ be marked as Respondent’s Exhibit A-4.

(Deposition of Arney Burns.)

“(Blueprint drawing marked for identification as Respondent’s Exhibit A-4.)

“Q. Mr. Burns, handing you what has been marked Respondent’s Exhibit A-4, I will ask you if that is, in your opinion, a correct outline drawing of the Denali, showing the lower hold?

“A. Yes, it is.

“Q. First, with respect to Number 3 lower hold, will you take a red pencil and just indicate the space there that represents the shaft alleys. I would suggest that you mark several cross [259] marks showing the shaft alley space.

“A. Yes. (Witness indicates on Exhibit A-4.)

“Q. The spaces that you have marked with zig-zag red lines in Number 3 and Number 4 lower holds represent the shaft alley space, is that correct?

A. That is correct.

“Q. Mr. Burns, the space between those two shaft alleys, in both Number 3 and Number 4 lower holds, represents the space, does it, where the barrels of herring loaded at Port Wakefield were stowed?

A. Yes.

“Q. Referring again to Respondent’s Exhibit A-4, and the forward end of the Number 3 hold, there appears to be a space between the forward end of Number 3 and the space marked ‘Engine Room.’ Will you tell us what that space is? Do you understand what I mean?

“A. Yes. That appears to be an alleyway.

“Q. On the drawing it appears to connect the two shaft alleys; is that what it is? I have reference

(Deposition of Arney Burns.)

to the space between 'E' and 'E,' as shown on Respondent's Exhibit Number 4?

"A. Yes. (Witness examines Respondent's [250] Exhibit Number A-4.)

"Q. Let us put it this way; is there any alleyway between the two shaft alleys, forward of Number 3?

"A. I do not recollect if there is or not. It is a long time, and I do not remember.

"Q. What would the drawing indicate?"

Mr. Hamlin: That is objected to because it is not shown that the witness is qualified to draw a conclusion from the drawing.

(Argument on objection by respective counsel.)

The Court: The objection is overruled.

"A. The drawing indicates an alleyway.

"Q. The drawing indicates an alleyway. Between the two shaft alleys? A. Yes.

"Q. In connection with handling cargo aboard vessels generally, and the Denali in particular, are you frequently in and out of the holds?

"A. Yes; during cargo operation. [251]

"Q. You are familiar with the insides and the characteristics of the holds? A. Yes.

"Q. On the Denali, on Voyage 55, state whether or not there were any steam pipes in either Number 3 or Number 4 lower holds?

"A. Not to my knowledge.

"Q. How are the winches on the Denali run?

"A. By electricity.

(Deposition of Arney Burns.)

“Q. How is the steering engine of the Denali operated?

“A. As I recollect, it is hydraulic,—operated by hydraulic.

“Q. Mr. Burns, at the time you loaded the barrels of herring in Number 3 and Number 4 lower holds, at Port Wakefield, on August 27, 1946, what can you tell us as to the condition of those two holds?

“A. Their condition was good. They were dry and clean.

“Q. At that same time referred to in the last question, namely, the time of loading this herring, what can you tell us as to the general condition of the vessel, with respect to it being in proper order and condition, or [252] otherwise?

“A. Good.

“Q. As far as you know, was everything in proper working order?

“A. As far as I know, that is right.

“Q. Was there anything at all wrong with the vessel that you know of?

“A. Not that I remember, no.

“Q. Was the loading of herring on this occasion, on August 27, 1946, at Port Wakefield, carried out as usual, or was there anything wrong or different on this occasion?

“A. It was a normal operation all the way through.

“Q. Mr. Burns, tell us about Number 3 and

(Deposition of Arney Burns.)

Number 4 lower holds, as to whether that whole space is above or below the waterline of the vessel?

“A. Part of the lower hold would be below the water line.

“Q. Does the fact that the hold space, or part of it, is below the water line, in your opinion, have anything to do with whether or not the hold is cool, or kept cool, by reason of that fact?

“A. I believe it would have some effect, yes. [253]

“Q. Is there anything you can think of, Mr. Burns, either on the particular voyage in question, Number 55, from Port Wakefield to Seattle, August 27th to September 4th, or generally on the Denali on any other voyage, which would make either Number 3 or Number 4 lower holds hot?

“A. Will you please repeat that?

“(Question repeated.)

I have never had any experience to that effect since I have been on the vessel.”

Mr. Wakefield: Mr. Hamlin makes an objection.

The objection stated by Mr. Hamlin is as follows:

“I do not think the answer is responsive to the question, and I would like to object to it.”

I state as follows:

“Q. The objection is made that your answer is not responsive, and the question was, is there anything you can think of that happened, or any condition, that would make this a hot hold, or make these two holds hot [254] holds? A. No.

(Deposition of Arney Burns.)

“Q. Is either Number 3 or Number 4 lower hold considered to be a warm hold on the Denali?

“A. No.

“Q. Had you ever carried barrels of herring in Number 3 and Number 4 lower holds on other voyages? A. Yes.”

Mr. Hamlin: There is an objection to that question on several grounds. It opens up a field of inquiry which I take it is not open to the respondent in this action.

As I understand it, the respondent may rebut any of the evidence which has been introduced by the libelant on its case in chief and further it may show that the vessel was seaworthy or that the damage occurred under one of the causes under the carriage at sea act.

This is in attempt to show that on other occasions cargoes came through all right. I submit that that is not relevant to this inquiry and that it is a field not open to the respondent under any theory of its defense. [255]

Mr. Wakefield: If the Court please, this is highly material because the libelant having shown testimony which in his opinion established or tended to establish the good condition of the commodity, and then having shown it to be damaged upon discharge, contends that that damage was the fault of the respondent or the vessel.

(Argument.)

The Court: The objection is sustained.

Mr. Wakefield: If the Court please, I don't want to labor the court——

(Deposition of Arney Burns.)

The Court: The ruling will stand.

You may proceed.

Mr. Wakefield: Do you mean——

The Court: The question asked and the objection to it is now what is before the Court and that objection is sustained.

Mr. Wakefield: May I ask the reporter to read what the objection was and the grounds?

(Last objection by Mr. Hamlin repeated by the reporter.)

The Court: The ruling will stand. You may continue with the reading of the deposition. [256]

“Q. Would you say it was customary to carry barrels of herring in Number 3 and Number 4 lower holds on the Denali?

Mr. Hamlin: The same objection is addressed to that question as to the former one.

Mr. Crutcher: If I may interject my comment here. I believe I answered the former question.

The Court: You had better find out what the record shows as to what was objected to. As I understood, it was the first one. It was the question of what he had done previous.

Mr. Wakefield: To clear up the record, I will admit that the objection was to the question on Line 6 reading,

“Had you ever carried barrels of herring in number 3 and number 4 lower holds on other voyages?”

and that the Court sustained the objection to that question, to which I excepted.

(Deposition of Arney Burns.)

The Court: The ruling will stand. And here we have another objection, is that right?

Mr. Hamlin: Yes, Your Honor. I [257] interpose the same objection as made to the other,—it is granted on materiality, as I stated before.

Mr. Wakefield: If the Court please, in connection with this question the following portion of the deposition indicates that I have an exhibit marked A-5 for Voyage 54 immediately preceding the voyage in question on which Voyage 924 half-barrels of salt herring from Port Wakefield were loaded in Number 3 lower hold, center, the identical place where the herring on this voyage was loaded.

I think that is highly immaterial because it shows that this same shipper shipped the same commodity in the same space a matter of a month before this, without any damage or claim.

The Court: I would like to have brought before the court again what it is you are objecting to, Mr. Hamlin.

Mr. Hamlin: Counsel read a question as follows, Your Honor:

“Would you say it is customary to carry barrels of herring in number 3 and number 4 lower holds on the Denali?”

I then objected to that question upon the same grounds that I had stated in objecting to the question [258] immediately before it, namely, that it is not competent for the respondent to show that at some former time cargoes were carried in this hold without damage. The carriage of goods by

(Deposition of Arney Burns.)

Sea Act casts a burden upon the respondent to show that when cargo was damaged, it was through some one of the causes excepted under such act, or accepted under the terms of the bill of lading, before the respondent can escape liability.

Mr. Wakefield: That is a mis-statement of the law, Your Honor, and I don't want to be understood as agreeing to that in any sense of the word. That is not the law.

The Court: What is the rule respecting preserving objections to questions? What is waived by failing to state an objection, if anything is waived by such a failure, according to your contention, Mr. Wakefield?

Is there anything waived by failing to state an objection, or in what respect is there a waiver by failure to object?

Mr. Wakefield: Do you mean at the time the deposition was taken?

The Court: Yes, that is what I mean.

Mr. Wakefield: Well, this deposition on page 2 [259] stipulates that all objections are reserved until the deposition is offered in evidence at the time of the trial of this cause, except objections as to the form of the questions or the answers thereto not being responsive, which objections shall be made and taken after this time.

The Court: Where are you reading from?

Mr. Wakefield: On page two, Your Honor.

The Court: Page two, the second paragraph of Mr. Wakefield's statement?

(Deposition of Arney Burns.)

Mr. Wakefield: Yes, it starts on line seventeen.

The Court: I think the court should make the same ruling here as was made in regard to the other objection.

Mr. Wakefield: I would like to have this exhibit marked as Respondent's Exhibit A-5, which is entitled "Hatch List."

The Court: It is so marked.

If counsel between now and tomorrow morning would furnish to the court the decision of an Appellate Court, regarded by counsel as controlling on this Court's action upon a question [260] of this sort, I say to counsel the same authority will be welcomed by this Court to see, by any chance, if the Court can be in error.

Mr. Wakefield: If the Court please, I don't understand the basis of the objection, or the basis of the ruling. I can't see that there is any question about it. This goes to the question of proper stowage. The exhibit Your Honor now has shows a shipment by this same libelant a month before. You can't prove proper stowage other than by what has been carried there.

The Court: It might properly be stated in response to Mr. Wakefield's last remark, that obviously counsel present cannot cross-examine as to this previous stowage, and cannot know what the conditions as to the previous stowage were, whereas each is supposed to have investigated and learned and have been advised concerning the conditions affecting stowage in the case here in dispute.

(Deposition of Arney Burns.)

Mr. Wakefield: Counsel for the libelant has cross-examined this witness at length on the stowage on the previous voyages, Your Honor.

The Court: He may have cross-examined as far as he could at that time. Maybe you might find that would hold that his doing so waived his right to [261] object to it. I don't know.

As I say, you are advised that if you can present to the Court by tomorrow morning an Appellate Court Decision controlling this Court's action on this question, Mr. Wakefield, I would be very glad to reconsider the Court's ruling just announced.

Mr. Wakefield: May I proceed with the deposition?

The Court: Until another objection is made, yes.

(Document entitled "Hatch List" marked for identification as Respondent's Exhibit A-5.)

"Q. (By Mr. Wakefield): Mr. Burns, handing you what has been marked Respondent's Exhibit A-5 entitled 'Hatch List,' for Voyage No. 54, will you tell us what that is?

"A. That is the correct stowage of cargo loaded into the ship.

"Q. In which hatch? A. No. 3 hatch.

"Q. Does that bear your signature 'A. E. Burns'?" A. Yes.

"Q. What voyage does that cover?

"A. Voyage No. 54. [262]

"Q. What date was that voyage, with respect to Voyage No. 55? I mean, was it immediately before it? A. The previous voyage.

(Deposition of Arney Burns.)

“Q. The date shown on the exhibit is July 28, 1946, what date does that represent?

“A. The date that this cargo was loaded.

“Q. Referring to what has been marked Respondent's Exhibit A-5, tell us whether or not you had any salt herring, or barrels of herring, in No. 3 lower hold?”

Mr. Hamlin: The objection is made to that question which was made in the last two objections.

The Court: The Court will make the same ruling. You may state your position for the record in order to preserve your position on the record.

Mr. Wakefield: My position is the same as before with this additional fact, Your Honor:

Mr. Wakefield on cross-examination and on direct examination said that he never had had any herring stowed from his plant in Number 3 lower hold.

The Court: Mr. Who said that so?

Mr. Wakefield: Mr. Wakefield, the libelant's president. I now produce this hatch list to show [263] that his herring was carried in Number 3 lower hold.

The Court: If that is the theory upon which this is offered I will ask Counsel for the libelant to respond to that as this is rebuttal evidence rebutting positive testimony to the contrary of that offered by libelant.

What have you to say about that?

Mr. Hamlin: I believe the question was asked of Mr. Wakefield on cross-examination and his re-

(Deposition of Arney Burns.)

sponse, as I recall it, was that he did not recall but he would not deny that such a stowage had been made before.

The Court: The ruling will stand, if that is the status of it.

Mr. Wakefield: If the Court please, I don't like to argue this unduly but the witness——

The Court: The Court directs that you stop arguing it unduly and I will say this to you: Is there any other testimony by word of mouth which you can produce during the remainder of the afternoon so as to give you an opportunity to find authority which you ought to have on a question like this,—which both sides ought to have on a question like this—if it is of such great importance? Naturally, [264] I would welcome such authority.

Is there any other testimony available to you which you intend to offer in this trial which you could now produce if the Court permitted you to interrupt the reading of this deposition until some other time?

Mr. Wakefield: Yes, I have lots of testimony but——

The Court: The reading of this deposition can be interrupted at this time and you can proceed with some other testimony if over night you think you can find some authority which will help this Court to avoid what you content is plain error, on your part. Such authority will be welcomed, Mr. Wakefield. But the Court's ruling will stand until

(Deposition of Arney Burns.)

you show the Court some authority which will alter that ruling.

I wish opposing counsel to take advantage of the same opportunity to find any authority which he thinks controls this court's action and supports or tends to support his position in the matter.

If you wish to do so, the Court will interrupt the reading of this deposition to give you the privilege of saving this point until tomorrow morning if you think you will not finish this afternoon [265] normally, and give you the right to call some other witness and let's proceed and not take up any more time arguing this matter now. Which is your preference?

Mr. Wakefield: I would be most happy to comply with Your Honor's suggestion but frankly I don't know what I would look for if I tried to find authority.

The Court: You don't? I am sure that I don't.

Mr. Wakefield: I don't see the basis of the objection.

The Court: I merely offer that for whatever it is worth. You are not required to accept and you may proceed with the reading of this deposition in respect to the parts not objected to and as to which the Court does not sustain objection.

Mr. Wakefield: Do I understand Your Honor sustains objection to the offer of libelant's Exhibit A-5?

The Court: I doubt if that is what is now before the Court.

(Deposition of Arney Burns.)

I thought what was before the Court was another way of getting at the same object, the inquiry as to which had been objected to and the objection [266] was sustained. I didn't realize at this moment that that exhibit was now being offered.

If you wish to offer it, I will rule upon the offer in case there is any objection.

Mr. Wakefield: At this time I would like to offer in evidence Respondent's Exhibit A-5 which is a Hatch List of Number 3 hold on Voyage 54, the voyage immediately preceeding the voyage in question which shows that 900 odd barrels of herring from Port Wakefield, shipped by this same libellant, were stowed in Number 3 lower hold between the shaft alleys.

I will connect up the exhibit by showing there was no damage to the herring by another witness. I offer the exhibit for two purposes; the first purpose being to prove that the stowage of herring in Number 3 hold is usual, customary and proper. I offer it for the second purpose, that Mr. Wakefield testified that the Denali always made a starboard landing at Port Wakefield and loaded herring into Number 1 hold and that this was the only time he could recall that herring had been loaded into Number 3 hold.

This exhibit is offered to impeach that testimony and to show that within less than thirty [267] days prior to this shipment in question he had had over 900 barrels loaded in this same hold on this same ship.

(Deposition of Arney Burns.)

The Court: That last thing as to whether or not this is rebuttal, is the situation any different now than it was a moment ago when Mr. Hamlin responded to that?

Mr. Hamlin: I know of no difference, Your Honor.

The Court: You may state your objection to this offer, if you have any.

Mr. Hamlin: Libelant objects to the introduction in evidence of Respondent's Exhibit A-5 on the ground that it is not material to any inquiry in this action, merely showing that at some prior time a shipment came through without damage, and that it has no bearing on what occurred in this case. It does not support any of the defenses open to the respondent but is simply to show that on other occasions this hold did not damage the cargo.

It must be shown that the damage to this cargo was damaged by something for which the respondent is not liable and the burden is upon him to show that. We start out with the theory [268] that the carrier is the insurer of the cargo but he may escape liability by showing some one of these excepted causes.

The second ground upon which it is objected to as being untenable is that I do not believe Mr. Wakefield ever made a flat statement of any kind about where any prior cargoes were shipped on board the Denali and even if he did so, that mere fact does not make that field of testimony relevant to this inquiry.

(Deposition of Arney Burns.)

The Court: The objection is sustained subject to the same condition the Court previously noted. Counsel in finding some authority controlling upon this court's action will be favoring the court in finding it so that the court may change the ruling if it should be changed.

Proceed.

Mr. Wakefield: In view of the Court's ruling and without waiving my contentions, I request that the deposition of Mr. Burns, being read, be suspended on page 18, line 10, with leave to continue the deposition at a later time.

The Court: That request will be granted.

You may step down.

(Mr. Crutcher, who had been reading the [269] answers to the deposition stepped down from the witness stand.)

The Court: Call the next witness.

Mr. Wakefield, the Court is informed that the original deposition here in question has been filed in the Clerk's Office now. The same is now published.

Call the next witness.

Mr. Wakefield: Mr. Teichroew.

P. A. TEICHROEW,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Your name is P. A. Teichroew?

A. P. A. Teichroew.

Q. That is Dutch, is it, Mr. Teichroew?

A. That is right.

Q. What is your occupation? [270]

A. Purser on a freighter.

Q. How long have you been going to sea?

A. Well, continuously the last time since January, 1945.

Q. Were you on the SS Denali on Voyage 55 in August and September, 1946? A. I was.

Q. Were you purser at that time?

A. Technically on the Articles, "Senior Assistant." On the Danli there is a Chief Purser, Senior Assistant and two Junior Assistants. But actually they call them Chief Purser, and Purser. We always signed as Purser but I was actually Senior on the Articles.

Q. Do you recall the time that the Denali called at Port Wakefield on August 23rd, 1947, to load herring? A. I do.

Q. What did you do on this occasion with respect to the herring,—I mean, what is your job?

A. Well, my job is to sign the bills of lading, to inspect the shipment first,—to count it. And that particular ship the Juniors were supposed to do it

(Testimony of P. A. Teichroew.)

and I was breaking in a new one. That is why I particularly remembered the day.

Q. Did you count the herring that was loaded on this [271] occasion?

The Court: Do you mean the barrels?

The Witness: The barrels, sir,—I am sorry.

Q. (By Mr. Wakefield): When the Denali came into the dock, tell us what you observed with respect to barrels of herring?

A. I called the new junior's attention to the fact that there were quite a few of them. I guessed at it at around 400. They were around the outside and could easily have been guessed at three high. I also noted that they were stacked so you could note any leakers.

Q. You say these were stowed outside. What do you mean "outside"?

A. They were out on the dock in front of the warehouse.

Q. Did you later go ashore and make inspection of these barrels?

A. Oh, yes. I was ashore most of the time until everything was loaded.

Q. What was the condition of the barrels out on the dock?

A. Very good condition. I didn't find any leakers at all. They were dry.

Q. Were the barrels covered with anything?

A. No.

The Court: May I ask for the Court's convenience that you remind me of what dock in what place you are speaking of at this time?

(Testimony of P. A. Teichroew.)

The Witness: I am sorry. Port Wakefield, Alaska.

The Court: In other words, it was the dock from which the barrels of herring were loaded onto the ship, is that it?

The Witness: That is right, sir.

The Court: You may proceed.

Q. (By Mr. Wakefield): Were these barrels covered at the time?

A. They were not covered when we came up, no, sir.

Q. Were they wet or dry? A. Dry.

Q. Mr. Teichroew, did you have any occasion to put your hands on any of these barrels or feel them?

A. We automatically, when we are counting, walk along and put our hands on the barrels as we go down the rows. We all count barrels that way,—put our hands on them and walk down the row to count them.

Q. What would you say as to whether the barrels were cold or warm?

A. They were warm. Well, they were in the sunshine. [273]

Q. They were in the sun at the time, and the barrels were warm? A. Yes.

Q. Did you load that lot first from the face of the dock? A. We did.

Q. And then where were the rest of the barrels stored that you loaded?

A. They were immediately inside the warehouse.

(Testimony of P. A. Teichroew.)

on each side of the entrance, going back to the reduction plant.

Q. How far, roughly, is that from where the barrels were on the dock?

A. Oh,—just, it can't be forty feet from the door. I don't believe it is over thirty feet from the bulrail to the front of the warehouse.

Q. Were these barrels that were in the warehouse in the front end of it, toward the ship?

A. Yes, right next to the door.

Q. From your experience is it customary to find—in stopping at herring plants,—to find barrels of herring out on the dock uncovered and dry?

A. It is customary to find them out on the dock ready to load but not necessarily dry, no.

Q. What condition are they usually in when you load them from the dock? [274]

A. I can best answer that by saying how they were at the next dock.

Q. Well, we will go to that. After the ship left Port Wakefield, where did you next load?

A. We went to the next dock at Port Vita.

Q. Where were the herring barrels there?

A. Out on the dock. They were all wet. They had been soaking them down because they were covered with water up to the chine. I believe that is described as the chine,—that part of the barrel that comes up over the lid.

I told the loader to roll them over and look for leakers. That was all I was interested in was seeing that the barrels were in good condition before being loaded on the ship, on the outside.

(Testimony of P. A. Teichroew.)

Q. Going back to Port Wakefield, what did you observe as to the condition of the barrels on the inside of the warehouse, as to whether they were wet or dry?

A. I would say they were not as dry. They seemed to be damper, naturally, inside.

Q. Did they have water on them?

A. No. They were stacked the same way. They were stowed on their sides, two and three high.

Q. How long were you on the Denali, Mr. Teichroew?

A. I was on the Denali all of 1946 and I got on her [275] the fall before. I would say thirty days after the war ended. That was about the time I got back from Okinawa—I can't give you the dates—in 1945.

Q. During that time that you were on the Denali, can you tell us whether or not barrels of herring were loaded and stowed in Number 3 and Number 4 lower holds? A. They were.

Mr. Hamlin: That question is objected to as being wholly immaterial.

The Court: The objection is sustained for the reasons stated before provided that if the Court is convinced by authority later to be discovered by counsel that the ruling is wrong, the court will give to counsel an opportunity to recall the witness to propound it.

This question and answer is stricken and the Court will disregard it.

Mr. Wakefield: May I make an offer of proof?

(Testimony of P. A. Teichroew.)

The Court: You may make an offer of proof at this time.

Mr. Wakefield: I offer to prove by this witness that during the time that he was on the [276] Denali—as he testified to—that barrels of herring were customarily and frequently carried in Number 3 and Number 4 lower holds between the shaft alleys; that he frequently has been in those holds when they were loaded and that he knows of his own experience and knowledge that those holds are cool, that they are not warm; that on northbound voyages from Seattle to Seward and other ports, he knows of his own knowledge that perishable cargoes are customarily carried in Number 3 and Number 4 holds, such commodities consisting of such goods as eggs, lard, onions, potatoes and so forth, and that such cargoes are carried successfully and without damage.

Mr. Hamlin: Any and all of the evidence referred to in counsel's offer of proof is objected by libelant on the ground it is wholly immaterial and not in support of any defense open to the libelant or to any rebuttal.

The Court: The objection is sustained subject to the same condition which I previously stated. Proceed.

Q. (By Mr. Wakefield): Mr. Teichroew, in connection with this particular voyage of the Denali, Voyage [277] 55 from Port Wakefield to Seattle, were you down in Number 3 or Number 4 lower holds on any occasion?

(Testimony of P. A. Teichroew.)

A. I was in both holds.

Q. What was the occasion for your going down into those holds?

A. I checked myself for stowage because I have to type up these hatches and I have to make a consist ready at the last port to be wired in in advance of our arrival. So I want to be sure as to what I am turning into the agent before I come down.

I also come down every trip. It is part of our duty to make reports on damaged cargo of any kind northbound, and I want to know where it comes from because the Claim Agent and the Superintendent want to know where it happened, whether the sailors are doing it or who is and the only way I can do that is to go down below.

Q. On this particular voyage that is in question here, southbound, did you at any time find either Number 4 or Number 3 lower holds to be hot or warm?

A. I did not.

Q. Did you find those holds to be normally cool?

A. They normally were cool.

Q. Was there anything that occurred on this voyage, to your knowledge, that could account for any condition [278] to change the condition that you just mentioned?

A. Not to my knowledge.

Q. Mr. Teichroew, can you tell us generally the characteristic of the Port Wakefield plant and dock,— I mean in comparison to other docks that you stop at up there?

(Testimony of P. A. Teichroew.)

A. Much smaller is my recollection. I have nothing to do with docking or coming in.

Q. But it is a small dock?

A. I happened to notice it is quite small.

Mr. Wakefield: I think that is all.

The Court: You may cross-examine.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Teichroew, do you recall approximately how high the warehouse is on the Port Wakefield dock at the point where the 400 barrels you have mentioned were stored as the Denali approached the dock?

A. My recollection is that it would be 10 or 12 feet there in front.

Q. Can you state approximately the time of day you arrived there at Port Wakefield?

A. I would describe it as a day just like today. [279]

Q. I say the time of day?

A. Oh, the time of day? I thought you said type of day. I am sorry. I would have to look at the record on that because I am up 24 hours sometimes and I don't know. The sun was shining.

Q. The record shows that it was somewhere between 11:00 and 12:00 in the forenoon. You say the sun was shining?

A. The sun was shining, yes.

Q. Had the sun been shining all morning that day?

A. To the best of my knowledge it had.

(Testimony of P. A. Teichroew.)

Q. You think that was an entirely clear morning, do you?

A. It was a very nice day to my recollection because I do know it was dry and nice there.

Q. How was it during the rest of the afternoon; did the sun keep on shining all day?

A. It seemed to me I was up most of the night. If I remember rightly we were loading—I can't tell. It might have rained during the night, I don't remember.

Q. I mean up to the time that the sun went down during the evening.

A. It seemed to me it was a nice day all day.

Q. No clouds at all in the sky?

A. That I wouldn't remember. There could have been.

Q. How about the day just before this; was it clear [280] all day that day, too?

A. There are some very nice days but I couldn't hope to remember back a couple of years back,—all of the days. I wouldn't want to state.

Q. You don't recall whether or not on any other day in August, 1946, except on the 23rd, is that right?

A. No. The weather was very nice the next day, too, on the 24th.

Q. Any clouds, do you know?

A. Not that I remember of.

Q. No clouds?

A. Oh, there could have been clouds but what I call good weather is when we don't have to put on our raincoats.

(Testimony of P. A. Teichroew.)

Q. That was the 24th of August, wasn't it? And on that day you were at the Port Vita dock?

A. On the next day we were at Port Vita. I don't remember any rain there at all. But I do remember distinctly there were quite a few mosquito.

The Court: Is it your intention to be understood as saying in effect there was no rain while you were taking on board this Apex Company herring?

A. I don't remember of any, Your Honor. I don't remember of any rain at all.

Q. (By Mr. Hamlin): On either the 23rd or 24th of [281] August, did your vessel approach or go to the Port of Kodiak, Alaska?

A. We must have been there either coming or going and possibly both ways because we always make Kodiak a port of call.

Q. As I understand it it wasn't cloudy on either August 23rd or 24th, is that right?

A. I don't....

Mr. Wakefield: I object to that as quibbling with the witness.

The Court: I didn't hear him say as to clouds. I thought he confined his statement to open weather, no rain.

The Witness: No rain.

Q. (By Mr. Hamlin): What is your statement as to clouds?

A. My recollection is that the sun was shining brightly when we got to Port Wakefield, and I don't remember any rain there for a couple of

(Testimony of P. A. Teichroew.)

days. I don't believe I got my rain clothes out there for several days.

Q. What does it mean when it is said that a barrel of salt herring is a leaker?

A. Oh, in loading sometimes a stave may be split slightly and the water runs out. No shipper wants the shipment to go out that way and they instruct their [282] coopers to fix them before they go aboard. Of course, we don't want any leakers either.

Q. Was it necessary for you to touch every one of these barrels?

A. No. You see, I just go down the row and count them as I go. I am sorry to say that I even do that with fish meal.

Q. Was any portion of this shipment in any area of shade when you arrived there?

A. Not out in front of the dock.

Q. No shade at all? A. I didn't see any.

Q. Was it piled up against the warehouse?

A. That is right.

Q. That warehouse was 12 feet high, I think you said?

A. It was only piled up three high,—that is, three on the slant.

Q. I suppose up there in that latitude, the sun is not straight overhead, is it, at noon?

A. No. But I have been badly burned in April or May.

Q. About what angle is it,—45 degrees in the sun?

(Testimony of P. A. Teichroew.)

A. I am sorry; I am really just the office boy. I don't pay any attention to the sun or the angles or the latitude. But I do know it gets very warm.

Q. Were these barrels exceptionally hot, as you felt them? [283]

A. No. But they were definitely warm. They were warmer than they were inside. That I remember. But I thought nothing of it because naturally they would be warmer in the sun.

Q. Calling your attention to Libelant's Exhibit 6, which has been admitted in evidence, would you please look at the signature down in the lower right-hand corner of Libelant's Exhibit 6 and tell me whether or not that is your own signature?

A. That is my own signature.

Q. Did you prepare this bill of lading, Libelant's Exhibit 6?

A. That I can't remember. I often do. I believe usually Apex Fish prepared their own. I don't remember. I use so many typewriters that I couldn't—

I imagine this was made by Apex Fish Company, but of course—

Q. Was it already typed out when you signed it?

A. I don't want to go on record on that. It could have been. I think it was for this reason, because I see in my writing again, after the word "quarters" I have put in "bbl." in parenthesis, so it possibly was already written out and I did that "bbl." to clarify it more for the freight clerk who would be [284] typing up the freight bill. He

(Testimony of P. A. Teichroew.)

wouldn't know what a quarter of salt herring was. So I put in the "bbl." That is my writing there, too.

Q. How does it happen, Mr. Teichroew, that you did not insert on this bill of lading some statement tending to note that these barrels were so dry and hot when they came aboard?

A. I thought nothing of it, really. It came to my mind that they were warm because it was out in the sun. They had told me repeatedly that salt herring was cured and it wouldn't be hurt,—that it didn't have to be put in cold storage, so I didn't consider that there would be anything wrong with it.

Q. You didn't consider that to be a matter of consequence?

A. It obviously is but I didn't then,—that is for sure.

The Court: The Court thinks that the proceedings had better be recessed at this point. I would like counsel on both sides to take advantage of this recess taken an hour earlier than yesterday with a view to trying to produce some authorities on this question which Mr. Wakefield has so earnestly presented here today.

Mr. Wakefield: Before the Court adjourns, may I offer Respondent's Exhibits A-1, A-2, A-3 and [285] A-4 in evidence?

Exhibit A-5 was rejected.

Mr. Hamlin: My memory of those is somewhat clouded.

Can ruling be reserved?

(Testimony of P. A. Teichroew.)

Mr. Wakefield: A-1 is the log book. A-2 is the actual hatch list for this voyage. A-3 is the stowage plan for this voyage. A-4 is the photostat copy of a sketch of the hold.

Mr. Hamlin: I have no objection to any of those.

The Court: Each of them is now admitted.

In fact, all of them are admitted except Respondent's Exhibit A-5—all of them in this series.

(Respondent's Exhibits A-1, A-2, A-3 and A-4 received in evidence.)

(Respondent's Exhibit A-5 rejected.)

The Court: Court is now adjourned until tomorrow at 10:00 o'clock.

(At 4:30 p.m., Wednesday, July 14th, 1948, proceedings recessed until 10:00 a.m. July 15, 1948, in the United States Court House.) [286]

Seattle, Washington

July 15, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: Are counsel ready to discuss the matter concerning the admission of evidence that was before the Court yesterday and continued until this morning?

Mr. Wakefield: I wonder if the Court would have any objection to my calling several other witnesses, first?

The Court: Whose testimony will not involve that point?

Mr. Wakefield: That is correct.

The Court: You may do that, Mr. Wakefield.

Mr. Wakefield: Mr. Sharp, will you step up, please? [287]

HAROLD VICTOR SHARP,

called as a witness out of order on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Mr. Sharp, will you state your full name, please? A. Harold Victor Sharp.

(Alaska Steamship Company Cargo Receipt marked as Respondent's Exhibit A-7 for identification.)

Q. (By Mr. Wakefield): Mr. Sharp, what is your occupation?

A. I am a waterfront checker.

Q. Where do you work?

A. I work at all the piers around the port, wherever I happen to be dispatched.

Q. Were you checking cargo on the Denali on September 4th, 1946, at Bell Street?

A. Yes, according to my time records that I keep, why, I worked the night of September 4th, 1946, at Pier 66 on the Denali. [288]

Q. What does the checking that you do include; just what are your duties?

A. Well, it varies with the various jobs I am on. In the case in question they were half barrels of salt herring from the Number 3 hatch first—

(Testimony of Harold Victor Sharp.)

and I believe we moved to Number 2 later—but anyway from Number 3 hatch we were landing them in a cargo net on the dock. I would count each load as the men would roll them in.

Q. Did you prepare as a result of the discharge of that herring a cargo receipt or O. S. & D. report? A. I did.

Q. Referring to what has been marked Respondent's Exhibit A-7, now in front of you, is that the O. S. & D. report?

A. That is the one I made out and signed.

Q. Does that bear your signature?

A. It does.

The Court: In this connection will you give the witness an opportunity to explain in the record the meaning of the letters O. S. & D.?

The Witness: O. S. & D. is a term we have on a report for over, short and damaged cargo.

The Court: In other words, "O" means over, "S" means short, and "D" means damaged?

The Witness: That is correct. [289]

The Court: Proceed.

Q. (By Mr. Wakefield): What is the date on the O. S. & D. report showing date of delivery of the cargo? A. 9/4/46.

Q. Can you tell us now what time of day that was discharged on the 4th of September?

A. It was discharged on the night of the 4th, including the morning hours up to 6:00 o'clock on the 5th. But we always figure,—and in signing, figure the date that the work started. That is, we

(Testimony of Harold Victor Sharp.)

carry through in signing. We don't sign for anything received from 1:00 o'clock in the morning to 6:00 o'clock in the morning as being on the following day. It is still on the former day's date.

Q. How many barrels does that show discharged?

A. It shows 971 half-barrels delivered.

Q. Can you tell us what hold on the ship that came from?

A. Frankly, from the O. S. & D., it does not show.

Q. Do you recall from your own recollection what hold it was?

A. Yes. It must have been Number 3 hatch. It was the first hatch aft of the house.

Q. Does that O. S. & D. report contain any notation as to the condition of the cargo? [290]

A. Yes, I made a notation here.

Q. It that your notation?

A. That is my notation.

Q. Was it put on at the time you made the O. S. & D. report?

A. I filled in the O. S. & D., and signed it. Before the dock would sign for it they wanted a notation on there in regard to the claimed damage, so I wrote that in there and then they signed it.

Q. What does that notation state?

A. It says, "971." Then I made a notation "Dock claims concealed damage by heat."

Q. Mr. Sharp, were you advised of the claimed damage during the discharge of the herring?

(Testimony of Harold Victor Sharp.)

A. I was. We were discharging herring from approximately 9:00 o'clock on as I remember it. It takes a little time to uncover and rig and get ready to go.

Q. After you heard that there was claim of damage, did you look at any of the barrels?

A. At my first opportunity. I think it was around midnight before I looked at any of them because I had to catch my count at the hatch as each load came out.

The Court: Near midnight on what dates?

The Witness: On the 4th. [291]

The Court: September 4th.

Q. (By Mr. Wakefield): Did you feel any of the barrels with your hands or otherwise?

A. I did, when I looked at them. The fish was cooked the way they expressed themselves. That is, the men that refused to buy them on account of the condition they were in—a buyer from Canada as I remember it made the remark that the fish was cooked, that all it was fit for was fertilizer. I wondered how they got cooked and I figured if they were the barrels would have to be hot. I felt some of them.

Q. Were the barrels hot or warm?

A. They weren't cold. They would be just what you would call the chill taken off of them. If I put my hands in water, of the same temperature I would say it was tepid, that was all. It was certainly not warm enough for cooking to suit my taste.

(Testimony of Harold Victor Sharp.)

Mr. Wakefield: I offer Respondent's Exhibit A-7 in evidence.

Mr. Hamlin: No objection.

The Court: Admitted.

(Respondent's Exhibit A-7 received in evidence.) [292]

The Court: Did the witness use the word or the term "tepid" or some such term?

The Witness: Yes.

The Court: You did that on September 4th, when you felt the temperature?

The Witness: Yes. They also opened some of the fish barrels that morning and oil had risen to the top of the barrels,—not a great deal of oil but enough fish oil to show.

The Court: Are there any further questions? You may step down.

(Witness excused.)

Mr. Wakefield: Mr. Felton. [293]

MICHAEL WILLIAM FELTON,
called as a witness out of order by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your full name, Mr. Felton?

A. Michael William Felton.

Q. And what is your occupation?

A. Port Engineer for the Alaska Steamship Company.

(Testimony of Michael W. Felton.)

Q. How long have you been Port Engineer for the Alaska Steamship Company?

A. Five years.

Q. What did you do prior to that time?

A. Marine Engineer on the ships,—all the way from Third Engineer to Chief Engineer.

Q. That is, actually sailing aboard the vessels as Engineer?

A. Yes; for the last twenty years.

Q. As Port Engineer for the Alaska Steamship Company, what generally are your duties?

A. Oh, the manning of the ships, looking after the repair [294] of the vessels,—that is principally my duties.

Q. In that capacity are you fully familiar with the construction and equipment of each vessel and the characteristics of them?

A. Yes; pretty much so.

Q. Are you frequently aboard these different vessels?

A. Yes,—many times.

Q. Are you familiar with the Denali?

A. Yes.

Q. Have you been aboard the Denali on many occasions?

A. Yes; lots of times every trip.

Q. You say every trip?

A. Yes.

Q. With reference to Number 3 lower hold and Number 4 lower hold on the Denali, will you tell us whether or not there are any steam pipes in either of those two holds?

(Testimony of Michael W. Felton.)

Mr. Hamlin: That question is objected to on the ground it is immaterial. The evidence requested is negative in character and not positive. By that I mean I believe it is open to the respondent here to show positively that these barrels were not warm but it proves nothing to show simply that there were no steam pipes in the hold. [295]

The Court: The objection is overruled upon condition that the inquiry be confined in point of time to the time during which the cargo in question was in the hold in question.

Mr. Wakefield: Yes, Your Honor. We will do that.

Q. (By Mr. Wakefield): The question was whether there are any steam pipes in the 2, 3 or 4 lower holds of the Denali.

The Court: Fix the time, Mr. Wakefield.

Q. (By Mr. Wakefield, continuing): —with reference to August and September, 1946.

The Court: I believe the time during which this carriage was being undertaken was August 22nd or 23rd to September 5th, or was it not?

Mr. Wakefield: No. August 23rd to September 4th, when they discharged, as the last witness testified.

The Court: Concerning that time let the witness consider the question.

A. There are no steam pipes in the lower holds of 3 and 4. I do believe there is a radiator line in the 'tween deck of Number 4. [296]

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): How are the winches on the Denali operated?

A. Electric winches.

Q. What is the steering engine?

A. A steam winch.

Q. Mr. Felton, with respect to Number 3 and Number 4 lower hold at the time in question, namely, August 23rd to September 4th or 5th of September, to your knowledge, were there any conditions of those holds which would produce any artificial heat?

The Court: Do you mean structural conditions?

Mr. Wakefield: Yes; such as steam pipes or other means of producing heat in the hold.

A. That was during the voyage, is that what you mean?

Q. (By Mr. Wakefield): Yes.

A. There were no changes made that would cause any different conditions than on previous voyages.

Mr. Hamlin: May I ask that be stricken on the ground it is not responsive to the question?

The Court: It is not responsive and should be stricken on that ground and it is so ordered.

Q. (By Mr. Wakefield): Mr. Felton, what I have reference to is the condition of 3 and 4 lower holds on the [297] Denali at this particular time that we are talking about as to whether physically there were any conditions in either hold which would account for or produce any artificial heat?

A. No.

(Testimony of Michael W. Felton.)

Q. Do you recall the instance of the strike on September 5, 1946? A. Yes.

Q. What, if anything, did you do on the morning of September 5, 1946, with respect to the Denali?

A. The ship was shut down due to the strike the morning of the 5th.

Q. Were you aboard the ship that morning?

A. Yes.

Q. You say the ship was shut down? Will you tell us in detail what you mean by "shut down"?

A. Well, to shut a ship down,—the engine room part, first, to begin with, we try to take the—

The Court: Try to answer what is called for in this instance rather than the custom or "sometimes" or "ordinarily" and that sort of thing.

Mr. Wakefield: Yes.

Q. (By Mr. Wakefield): What was done on this occasion to shut down the ship? [298]

A. The engineers, one of their first duties is to cut out a main condenser. When I say "cut it out" they take the steam—

The Court: It doesn't appear, Mr. Wakefield, that this witness is talking about what occurred on this ship on this occasion. His words would indicate what might happen on any similar ship on a similar occasion.

Q. (By Mr. Wakefield): Is this what happened on the Denali at this time?

A. This is what actually happened on the Denali on this morning, yes. It is the only way they

(Testimony of Michael W. Felton.)

can shut a ship down. They shut off the condenser and then they begin shutting off the stop valves on the boilers, all the sea valves and overboard valves. That means shutting down the light plant. That would call for shutting down all the force ventilation, the blowers, fans, all the force draft equipment in the engine room. That is the engine-room part.

On deck they secure all the gear. What I mean by that is that they secure the booms, they put the hatch covers on, close them up, and the last duties of the engine room on deck is to close the water-tight doors or the doors and ports that would let any [299] air and water into the ship,—to protect it. That was done on the Denali before the crew left.

Q. And you were down there at the time to supervise and see that this was done?

A. Just to see that it was done, yes.

The Court: Is it fair to say, so far as the truth is concerned, that the ship's lower Number 3 holds and Number 4 holds were sealed so far as working or cargo is concerned?

The Witness: The hatch covers were put on the top to keep the rain and water out, yes.

The Court: At this point I would like to interrupt the examination to try to help counsel in one or two other cases.

(Short recess.)

The Court: You may resume the examination of this witness.

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): Mr. Felton, at about what time on the morning of September 5th, 1946, was the Denali completely shut down?

A. It was completed about 10:30 in the morning.

The Court: What day? [300]

The Witness: Of September 5th.

The Court: In other words, the strike became effective in all respects so far as working the ship was concerned?

The Witness: That is right, sir.

Q. (By Mr. Wakefield): After the ship had been shut down as you described about 10:30 a.m., did the crew then all leave?

A. Yes. They left promptly after that. Their duties were over,—I am speaking of the engineers,—they packed their clothes and left.

Q. Who was left aboard the ship?

A. A ship's watchman.

Q. Mr. Felton, what can you tell us as to the effect of the shutting down of the ship as you have described it as to the heat in the holds, or in the ship generally?

Mr. Hamlin: At this point I object. He is asking for the witness' opinion. He hasn't shown that he is qualified.

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: I think you ought to ask him if he knows or what is the basis of it and qualify him.

(Testimony of Michael W. Felton.)

Q. (By Mr. Wakefield): Do you know the answer to that question? A. Yes.

Q. Do you know the effect as to heat of the shutting down of the ship generally?

A. I do as to the Denali.

Q. Do you know because you were there?

A. I was there.

The Court: You might ask him upon what facts that is based.

Mr. Wakefield: I was going to have him explain.

The Court: It is really better practice to lay the foundation without asking in detail first. That is always true in my opinion whenever there is an objection made to the qualifications of the witness.

Q. (By Mr. Wakefield): Mr. Felton, have you had the actual experience of observing the effect of shutting down the ship? A. Yes. [302]

Q. Do you know the effect it had on this occasion of September 5th that you have just described? A. Yes.

Q. Will you go ahead and tell us what the effect of shutting down the Denali had on the question of heat in the vessel and in the hold?

Mr. Hamlin: The same objection, if the Court please. I think the witness may show what he observed if he took the temperature. He is asking the opinion of what the shutting down did.

The Court: Overruled. You may answer the question.

(Testimony of Michael W. Felton.)

A. We got a call in the afternoon that the ship——

The Court: That is not quite within the limits of the question.

Q. (By Mr. Wakefield): We will get to that next. I just want you now to explain what effect the shutting down has on the heat within the ship and then the reasons why?

A. It warms up the whole ship considerably, especially in the engine room, shaft alleys and so forth due to all the ventilating fans, blowers, forced draft blowers for the boilers being shut down. The heat is still there and there is nothing to carry it away [303] due to the fact that the ship is all secured. All of the equipment down there still has the heat in it and it takes hours for it to cool. It has nothing to carry the heat out of the engine room, the fire rooms, shaft alleys and so forth.

Q. In shutting down the vessel are the various compartments open; I mean, is it necessary for the crew to go from place to place in the holds to shut down the ship?

A. Not too much in the holds. They put the hatches on the top and then in the engine fire rooms they have to go back and forth there. They have to go back to the after end of the shaft alleys, secure the stern glands. By that I mean they tighten up the packing so that the water doesn't leak in from the stern glands,—and they have to go to those compartments.

(Testimony of Michael W. Felton.)

Q. Would you say from your experience and your observation of the Denali and of other ships that after shutting down a vessel as you have described it, say for at least a period of 12 hours to 15 hours after shutting it down, that it would be warmer or cooler inside the ship and the holds?

A. I would say it would be warmer.

Q. Did you have occasion, Mr. Felton, to actually go down on board the Denali on the afternoon of [304] September 5th? A. I did.

Q. About what time were you down there?

A. Between 3:00 and 4:00 o'clock in the afternoon.

Q. Did you go down into Number 3 hold at that time? A. Yes.

Q. Will you tell us what the condition of Number 3 hold was at that time with respect to being warm?

A. The air was close, and seemed unusually warm?

The Court: On what date was that?

The Witness: The afternoon of the 5th.

The Court: About 3:00 o'clock, did you say?

The Witness: Between 3:00 and 4:00 o'clock. I don't exactly remember the time.

Q. (By Mr. Wakefield): What would you say as to whether or not the condition you observed at that time between 3:00 and 4:00 o'clock on the afternoon of September 5th with respect to the heat in Number 3 hold was greater or less than

(Testimony of Michael W. Felton.)

the condition of the hold when the vessel was in operating condition? A. It was warmer.

Mr. Hamlin: May it please the Court, we have an objection to that because it hasn't been shown [305] that this witness observed the operating condition of this hold during this voyage.

The Court: That might under some circumstances be well taken but in this instance, in view of this witness' former testimony concerning his duties, the Court overrules the objection.

Q. (By Mr. Wakefield): Have you been in Number 3 and Number 4 holds on occasions when the Denali was in operating condition; by that I mean not shut down as you have described them?

A. Yes.

Q. In the summertime, August or September, what is your opinion or observation as to what the temperature of Number 3 and Number 4 lower hold is as compared to say the outside atmosphere temperature?

A. On a hot day, when it is hot outside you go down in the lower hold of the Denali and other ships, it is cooler than it is up above due to the ship's side being exposed to the sea water which is around 40 to 45 degrees in the Sound and up to 54, which naturally cools the holds down.

Q. Is the Number 3 and Number 4 lower hold of the Denali below the water line?

A. Yes. [306]

Q. Does that in your opinion tend to cool the hold? A. Yes.

(Testimony of Michael W. Felton.)

Q. Would you say then that the hold as you found it on the afternoon of September 5th, was considerably warmer,—was it noticeably warmer than you have found it in operating conditions?

A. Only as I said before in the 'tween deck of Number 3 and Number 4. I was not in the lower hold. But the 'tween decks was warmer than usual.

Mr. Wakefield: You may inquire.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Felton, are the living quarters of any of the crew in the after portion of the Denali or were they during this period from August 23rd to September 4th, 1946?

A. The Stewards' Department lives aft on the Denali, yes.

Q. Are those quarters where the Stewards' Department lives heated? A. Yes.

Q. What kind of heat is furnished them?

A. Radiator system? [307]

Q. Steam heat? A. Yes.

Q. Where are the pipes which feed that radiator system with respect to Number 3 lower hold?

A. They wouldn't go through the lower hold. They go back through the shaft alley and up the shaft alley escape into the lower quarters.

Q. Do they follow through the shaft alleys?

A. Yes.

Q. How large a line feeds that radiator system?

A. I would have to guess but it is usually

(Testimony of Michael W. Felton.)

about an inch and a half line going up and a half-inch return.

Q. That is real live steam going in there, is it not? A. Yes.

Q. Does it return as steam or as water?

A. It is water; it is condensed.

Q. Do you know which one of the shaft alleys on the Denali that line passes through,—whether it is port or starboard? A. No, I don't.

Q. I think you mentioned that the winches on the Denali are operated by steam, did you not?

A. The steering engine and the after capstan are steam and the after winches are electric. [308]

Q. The after capstan and the steering winches are steam? A. Yes.

Q. Are they fed with steam pipes coming from the engine room? A. Yes.

Q. Where did those steam pipes pass back to the after winch and the steering engines.

A. They go back through the shaft alley, up the shaft alley escape, through to the steering engine and the warping winch.

Q. How large are the lines which feed those pieces of equipment?

A. They are about three-inch steam and four-inch exhaust, approximately.

Q. Do you know which of the two shaft alleys on the Denali those steam pipes pass through?

A. No, I don't.

Q. Do you know where they are located within the shaft alley?

(Testimony of Michael W. Felton.)

A. Well, they are on the overhead,—probably six or eight inches from the top of the shaft alley tunnel.

Q. Do you know how thick the bulkhead is that covers the shaft alley?

A. I don't know for sure. I imagine it is $\frac{5}{8}$.

Q. $\frac{5}{8}$? [309]

A. $\frac{5}{8}$ of an inch; I imagine about that.

Q. Steel. Is that insulated in any fashion?

A. The steam lines are insulated but not the tunnel itself,—only a wooden sheeting over it.

Q. The sheeting I assume covers the unjointed portions but how about the joints?

A. I can't say whether they are covered or not. They are supposed to be,—maybe they are all covered, I don't know.

Q. Isn't it standard operating procedure aboard the Denali to leave the joints uncovered for adjustment?

A. That is not good engineering practice.

Q. You don't know what they did on the Denali?

A. No.

Q. Do you know how often joints occur on the steam pipe which passes through Number 3 lower hold into shaft alley?

A. No, I don't. Sections of pipe are 20 feet long and unless they had an accident they are 20-foot sections.

Q. Are there any inspection valves located in the portions of the steam pipes which pass through Number 3 or Number 4?

(Testimony of Michael W. Felton.)

A. No. The master valve for shutting the steam and exhaust off is in the engine room and the other two [310] are at the machines,—the steering engine and the warping winch.

Q. Are there any other steam pipes which pass through the shaft alleys in the Denali aft of the engine room?

A. There is more steam pipes back there that would be used on occasions. There are steam lines to the heating coils in the oil tanks.

Q. Do you remember how big those steam pipes are?

A. They are usually three-quarters and one inch.

Q. Is there any heat generated within the shaft itself as it lies within the alley, in operation; does it warm up through turning?

A. Well, I don't believe it would be noticeable.

Naturally, a bearing has a warmth when running but I doubt if it would increase the temperature of your shaft alley at all,—maybe one degree, if at all. It would be very negligible.

Q. I suppose that shaft lies in bearings as it passes through the alley? A. That is right.

Q. At what interval are those bearings placed?

A. Those shafts are probably about 24-foot length shafts. There are about four bearings on each shaft alley.

The Court: Do those bearings develop a [311] noticeable amount of artificial heat?

The Witness: Well, you could put your hand on the bearing and it is slightly warmer than the

(Testimony of Michael W. Felton.)

adjoining steel or the pedestal it sets on. It is just noticeably different. It is such a slow turning shaft that you have very little heat there.

Q. (By Mr. Hamlin): I note that you stated that during this particular voyage Number 55 running from August 25, 1946, to September 4, 1946, there were no conditions in your opinion which would produce artificial heat within lower Number 3 and Number 4 holds.

I ask you first whether or not you were present on the Denali during that voyage?

A. No, I was not.

Q. Do you base your answer solely on the determination made at the end of the voyage?

A. No.

Q. On what?

A. On the Chief Engineer's Report.

Any undue or unusual conditions on the ship, the Chief makes a report out on his log book and his abstract and that is where we get our information for the voyage.

The Court: Did you go aboard on any occasion [312] prior to 3:00 to 4:00 o'clock in the afternoon of the 5th of September?

A. Several times. I was aboard the morning of the 5th while they were securing the vessel.

Q. What about the 4th; were you aboard on the 4th?

A. I can't remember how many times I was aboard.

(Testimony of Michael W. Felton.)

The Court: What parts of the ship did you visit on those occasions?

The Witness: The engine room, fire room, and all over the deck as I look after the repair work.

The Court: All over the deck; do you mean the top deck?

The Witness: The top deck, main deck, dining rooms.

The Court: The cargo space; I am inquiring about cargo spaces.

The Witness: Yes.

The Court: Did you visit any of those other than Number 3 and Number 4?

The Witness: Prior to the 5th?

The Court: Yes.

The Witness: I can't remember that I did.

The Court: I am trying to see if you observed whether or not there was any other cargo whose internal [313] temperature, like cargo in sacks or grain or bulk or any cargo that might have heat in it,—did you observe any other cargo than this cargo that might have any heat inside of it?

The Witness: No, I don't remember it now.

The Court: Or inside of containers or packages?

The Witness: No, I don't remember.

The Court: Was there any steel loaded in there or any iron goods of any sort?

The Witness: I can't remember what all was in the hold. I only look after repairs and I didn't pay too much attention to it.

(Testimony of Michael W. Felton.)

The Court: Did you observe the condition of any other cargo besides this salt herring that is here in question that you then suspected or might now suspect had a temperature that was greater than the outside temperature?

The Witness: I don't at this time remember of noticing any cargo in the ship.

Mr. Wakefield: If the Court please, may I make a suggestion in that connection? We have already offered in evidence the actual hatch list which shows what the cargo was in each of the holds. That hatch list shows nothing but herring and canned [314] salmon.

The Court: I just wish to know what this witness observed, if anything, along that line.

You may inquire, Mr. Hamlin.

Q. (By Mr. Hamlin): Did you go into Number 1 hold of the Denali when you were aboard her on the 5th when she was shut down?

A. No, I didn't.

Q. At no time on the 5th of September did you go in there? A. No, I didn't.

Q. Has it been your experience that the same heating up process takes place in Number 1 hold as you have described in Number 3?

A. It has been my experience on ships that the holds warm up when the ship is secured, yes.

Q. Is that true of the Denali, too, and was it true at the time in question on September 5th?

A. I wasn't in Number 1 hold in question so I could only go by experience.

(Testimony of Michael W. Felton.)

The Court: Do you mean after the ship is made in condition for being under way on the voyage or something else?

The Witness: No; I mean when the ship is [315] first shut down,—secured to lay up with everything shut down.

The Court: You mean when working operations on the ship—loading or unloading cargo ceases—is that what you mean?

The Witness: Yes, when the ship is really closed up.

Q. (By Mr. Hamlin): When you did go into Number 3 on the afternoon of September 5th, it is true, is it not, that you went only down as far as the 'tween decks? A. That is right.

Q. You did not at any time on that afternoon enter the lower hold? A. No.

The Court: Do you know at this time how much of the cargo from Lower 3 and Lower 4 was discharged before 10:30 o'clock on the morning of the 5th of September, 1946?

The Witness: No.

Mr. Hamlin: No further questions, Your Honor.

The Court: You may inquire.

Is there anything further on redirect?

Mr. Wakefield: That is all. [316]

The Court: You may step down.

(Witness excused.)

The Court: I believe at this time we will take a short recess.

(Recess.)

The Court: You may proceed.

Mr. Wakefield: Call Mr. Hanson, please.

EMANUEL HANSON,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, please?

A. Emanuel Hanson.

Q. What is your occupation, Mr. Hanson?

A. Superintendent of the Alaska Terminal and Stevedoring Company.

Q. How long have you been engaged in that business? [317]

A. I have been a year on this present job but before that I was with the Alaska Steamship Company.

Q. In what capacity were you working with Alaska Steamship Company?

A. Chief Stevedore.

Q. How long were you Chief Stevedore for the Alaska Steamship Company? A. Since 1936.

Q. Prior to that time what did you do with the Alaska Steamship Company?

A. I was General Foreman on the ships.

Q. Stevedore foreman? A. Yes, sir.

Q. Have you ever been to sea?

A. Yes, sir.

Q. In what capacity?

(Testimony of Emanuel Hanson.)

A. Oh, A.B., Boatswain, and so forth.

Q. How long were you at sea before you did stevedoring?

A. Oh, since 1904 until 1921.

Q. In your job as you have related as stevedore foreman and while with the Alaska Steamship Company, have you become familiar with their different vessels?

A. Yes.

Q. Are you familiar with the Denali?

A. Yes. [318]

Q. Have you been in the holds of the Denali on many occasions?

A. I have.

Q. How frequently, Mr. Hanson, would you say that you have been in the different holds of the Denali?

A. Lately I will say once and twice, every trip she is in but before that I was up and down several times a day.

Q. How about in August or September, 1946; were you in the holds of the Denali at that time?

A. Well, I have forgotten. I can't say for sure. I wasn't down to Bell Street, I know that.

Q. But I mean during that period of time?

A. Yes.

Q. You were in and out of the holds?

A. Yes.

Q. What does your job consist of as stevedore foreman, what did you do?

A. I put on a foreman, hire the longshoremen, and start to discharge,—get the cargo out of the ship and get the cargo into the ship. That is my job.

(Testimony of Emanuel Hanson.)

Q. In putting the cargo into the ship, do you decide where it should go?

A. With the Alaska Steam I did, yes.

Q. You decided where to put the different types of cargo? [319] A. Yes.

Q. Are you familiar with the characteristics of the different holds on the Denali as to what cargo should be carried in the different holds?

A. Yes, sir.

Q. Based on your experience as you have related it, I will ask you your opinion as to whether Number 3 lower hold on the Denali is a warm or a cool hold?

Mr. Hamlin: That question is objected to.

The Court: Try to fix the time which is material here, Mr. Wakefield.

Q. (By Mr. Wakefield): —with reference to August 23rd to September 4th, 1946.

The Court: The objection is overruled.

A. It is not warm and it is not cool. It is an average hold. I would say they are all the same.

Q. (By Mr. Wakefield): What would you say with respect to lower Number 4 at the same time?

A. That is a cool hold. It is below the water line. It is the same as Number 3 I would think.

Q. Are both Number 3 and Number 4 lower holds below the water line?

A. Yes, sir. [320]

Q. State your opinion as to whether or not Number 3 and Number 4 lower holds at the time in question—August and September, 1946, were proper

(Testimony of Emanuel Hanson.)

holds for the stowage and carrying of salt herring in barrels?

A. In my opinion they are, yes.

Q. State in your opinion and from your observation of the loading of cargo as to whether Number 3 and Number 4 lower holds on the Denali at this time in question are fit and proper for the carriage of semi-perishable cargo such as citrus fruits, eggs, lard, onions, tomatoes, potatoes, candy and so forth.

Mr. Hamlin: That is objected to as being entirely immaterial to any issue in this case.

The Court: I am not at the present aware of what the materiality is, Mr. Wakefield.

Do you wish to make a statement about it?

Mr. Wakefield: Simply to show, Your Honor, that in this witness' opinion and from his experience they carry these perishable cargoes in these holds. He has actually loaded them in these holds.

The Court: The conditions of perishability respecting the last-mentioned commodities might be so different from that concerning salt herring in barrels; at least, there is no preliminary proof made or foundation laid of similarity which would [321] justify the comparison in question. The objection is sustained.

It is without prejudice to your right to inquire as to any similarity of the standards of care of these various commodities mentioned by you. If you lay the foundation that there was a similar-

(Testimony of Emanuel Hanson.)

ity in the kind and degree of care given to these various cargoes, you may do that.

Q. (By Mr. Wakefield): Mr. Hanson, with reference to the cargoes I enumerated a moment ago in my last question, are those cargoes in your opinion and from your experience apt to be affected by any degree of heat in the hold? A. Yes.

Q. And in stowing such cargoes aboard the vessel, do you always put them in cool holds where they will be subject to the least amount of heat?

A. We are always trying to put them in the best——

Mr. Hamlin: Libelant has objection to that question and to the entire line of evidence indicated. It is not material to any defense of the respondent. It simply, if anything, tends to follow their theory that they followed due care in this shipment which is not a defense. It does not tend to either aid or [322] disprove the condition of the goods upon arrival or, (b) to explain why they were in that condition or, (c) to show that the condition came about as the result of some cause excepted under the Admiralty Law or the Bill of Lading, thereby relieving the carrier of any liability. It doesn't prove anything after they have proved the defense.

The Court: Because the Court understands that the questions now being asked are meant to lay the foundation for inquiring concerning the suitability of the space in question for any and all

(Testimony of Emanuel Hanson.)

kinds of perishable cargo usually carried by ships of this type, the objection is overruled.

“Any and all types of perishable cargo” includes, as the Court understands it, for the purposes of classification at any rate, barrels of salt herring.

Mr. Hamlin: May the libelant have an exception, please?

The Court: Allowed. You may answer this question if you remember the question, Mr. Hanson. If you do not, the Court will have the question read.

The Witness: I would like it read.

(Last question repeated by the reporter as follows: [323])

“Question: And in stowing such cargoes aboard the vessel, do you always put them in cool holds where they will be subject to the least amount of heat?”)

A. Yes, we do.

Q. (By Mr. Wakefield): In your opinion and from your experience, Mr. Hanson, is Number 3 such a hold? A. Yes, sir.

Q. I meant lower hold; is Number 4 lower hold such a hold? A. Yes, sir.

Q. And your answer as to Number 3 applied to the lower hold, did it?

A. The lower hold, yes.

The Court: Ordinarily, Mr. Hanson, as you remember it when you were going to sea and actu-

(Testimony of Emanuel Hanson.)

ally engaged as a member of the ship's crew, what person on board ship employed as a member of the complement of officers and men ordinarily prepared the ship's list showing the space where each particular type of cargo should properly be loaded on a particular voyage?

The Witness: The Chief Officer.

The Court: The Chief Officer is the fellow [324] who makes up the tentative cargo list, is that what you call it?

The Witness: Well, he is the one who sees where it goes in the ship.

The Court: He makes up a plan of stowage.

The Witness: That is right.

The Court: What do you call it?

The Witness: Stowage plan.

The Court: Then does the Super Cargo or the Superintendent of Loading operations then check the loading against that cargo list and note what happens to the cargo so far as placing it in the ship with respect to the suggestions on that list of what cargo should go where?

The Witness: No. Up North the Chief Officer does that. Down here the Chief Officer at Alaska Steam hasn't had too much to say about it but when he brings a suggestion in it is always taken.

The Court: Who does have "too much" to say about it?

The Witness: Well, I have had, so far.

The Court: Quoting the words "too much."

(Testimony of Emanuel Hanson.)

(Four papers, marked "Hatch List" marked as Respondent's Exhibit A-2 for identification.) [325]

Q. (By Mr. Wakefield): Mr. Hanson, you have before you what is marked Exhibit A-2 and has been admitted in evidence as Respondent's Exhibit A-2.

Is that the hatch list of the Denali for Voyage 55 southbound? A. Yes, sir.

Q. Would you kindly look at the list with respect to Number 3 lower hold? A. Yes.

Q. What cargo according to the hatch list was stowed in Number 3 lower hold on Voyage 55 southbound?

A. Canned salmon, halves of herring,—salmon and herring is all there was.

Q. Just salmon and herring?

A. In the lower holds, yes.

Q. Mr. Hanson, from your experience and your observation, what is your opinion as to whether or not cases of canned salmon have any quality of generating any heat or causing any heat?

A. They won't cause any heat that I know of.

Q. Will you turn to lower hold number 4 on Exhibit A-2 and tell us what cargo was stowed in Number 4 lower hold?

A. Salmon and herring.

Q. Was there anything else? [326]

A. No, sir.

(Testimony of Emanuel Hanson.)

Q. Would your answer be the same as to whether or not any canned salmon would cause any heat of any kind? A. Yes.

Q. In your opinion, is Number 3 lower hold first a fit and proper place for the Denali in September or August, 1946, for the stowage and carriage of salt herring in barrels? A. Yes, sir.

Q. Would your answer be the same as to Number 4 lower hold? A. Yes, sir.

Mr. Wakefield: You may inquire.

The Court: Do you find any cargo stowed in either one of those holds or on any deck at either one of those hatches, 3 or 4, which, in your opinion, could account for the increase and elevation of the temperature in the lower holds of each one of those hatches; is there any cargo anywhere on any deck at either one of those hatches 3 or 4 which could contribute to the elevating of temperature in that lower hold?

The Witness: No, sir. In the 'tween decks there was 35 tons of personal baggage,—trunks and so forth. [327]

The Court: Would that generate any heat in the ship as a Ship's cargo?

The Witness: No, sir. And then frozen fish.

The Court: Frozen fish. Where was that stowed?

The Witness: In Number 3 'tween decks, Box Number 8.

The Court: Was that in a compartment?

The Witness: In a compartment by itself, yes.

(Testimony of Emanuel Hanson.)

The Court: Was it iced inside of that?

The Witness: No, it was frozen,—cold storage.

The Court: Is that box a cold storage box?

The Witness: Yes.

The Court: A refrigerator?

The Witness: Yes.

The Court: And this pre-frozen fish was put in there to preserve its frozen condition, is that right?

The Witness: Yes.

The Court: Would that or would that not cause any elevation of temperature in the ship?

The Witness: No.

The Court: Would it not have a tendency to lessen the temperature? [328]

The Witness: To lessen, if any, yes.

The Court: Is there any other group of cargo at each and all of the decks of those hatches 3 and 4; see if you can find any cargo that would tend to elevate the temperature?

The Witness: Number 4 hasn't any 'tween decks; that is used as steerage.

The Court: Persons stayed there while in transit?

The Witness: While in transit, yes—passengers.

The Court: You may proceed and make any other comment as to the use of any other space.

The Witness: That was passengers in Number 3 and 4 'tween decks. They go on when the ship is ready to sail and go off at the end of the voyage.

(Testimony of Emanuel Hanson.)

Q. (By Mr. Wakefield): In reference to Number 2 and 3 'tween decks, are there not stewards' supplies and other such things kept there?

A. There is an enclosed place for stewards' flour and groceries on the starboard side and there is a United States Mail locker on the port side.

Q. This is in the 'tween decks? [329]

A. In the 'tween decks, yes,—steel.

The Court: They were in steel compartments, do you mean?

The Witness: Steel compartments, yes.

Mr. Wakefield: I think that is all.

The Court: You may examine.

Cross-Examination

By Mr. Hamlin:

Q. These answers you have given to the court's questions applied, did they, to the voyage 55 south-bound for which you hold the stowage plan now?

A. Yes.

The Court: Is that the voyage on which this soft herring here in question was brought from where it was shipped?

The Witness: Voyage 55.

The Court: Is the answer to the Court's question yes or no?

The Witness: Yes.

Q. (By Mr. Hamlin): Mr. Hanson, you have mentioned a refrigeration box in Number 3 'tween decks. What kind of a motor or other device is used to furnish [330] the cooling coils?

A. It is lead from the engine room along the ship's side there in the 'tween decks.

(Testimony of Emanuel Hanson.)

Q. The apparatus is down in the engine room, is it? A. Yes, sir.

Q. Are there copper tubes running from the apparatus?

A. Tubes of some kind,—I wouldn't say what they are—tubes from the engine room.

Q. You are quite sure there is no electrically-operated unit outside of the box? A. No.

Mr. Hamlin: No further questions.

Mr. Wakefield: That is all, Mr. Hanson. Thank you.

The Court: Step down.

(Witness excused.)

The Court: Call the Respondent's next witness.

Mr. Wakefield: Call Mr. Damalin, please. [331]

JAMES ALBERT DAMALIN,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, Mr. Damalin?

A. James Albert Damalin.

Q. Mr. Damalin, what is your occupation, sir?

A. Foreman.

Q. Of what?

A. Alaska Terminal Stevedoring Company.

Q. How long have you been engaged in that work? A. Well, about seven years.

(Testimony of James A. Damalin.)

Q. Prior to that time, what business or occupation did you follow? A. Longshoreman.

Q. How long prior to becoming a foreman, were you a longshoreman? A. Well, since 1910.

Q. Have you been here in Seattle during all that time? A. Yes.

Q. How long, Mr. Damalin, have you worked on the Alaska [332] Steamship Company boats?

A. Do you mean as a longshoreman?

Q. Yes.

A. I would say about fifteen or eighteen years.

Q. What is your job as foreman; what does that mean; what do you do?

A. This particular day, I was a hatch boss. My duties that day were to take charge of the men and see that the proper cargo was sent out, and see that it was handled properly.

Q. Is that generally what you do as foreman?

A. As a hatch foreman, yes.

Q. When you do that work, do you go into the hatch?

A. Well, on that job, you are in the hatch all of the time.

Q. Have you been in the holds of the Denali, on many occasions? A. Yes.

Q. Are you familiar with the number 3 and number 4 lower holds on the Denali? A. Yes.

Q. Are you familiar with those two holds as they were in August and September, 1946?

A. Yes.

(Testimony of James A. Damalin.)

Q. Did you act as foreman, on the discharge of herring [333] from number 4 lower hold on September 25, 1946? A. Yes.

Mr. Wakefield: I request the bailiff to have this paper entitled, "Hatch Book" marked for identification.

(Hatch book marked as Respondent's Exhibit A-8, for identification.)

Q. (By Mr. Wakefield): Handing you what has been marked as Respondent's Exhibit A-8, will you tell us what that is?

A. Well, that is the operation that the gang went through that day.

Q. What day? A. That was 9-25-26.

Q. September 25, 1946?

A. September 25, 1946.

Q. Does that exhibit bear your signature?

A. Yes.

Q. Is that the type of report or record that you make on the discharging of the different hatches?

A. Yes.

Q. Referring to Exhibit A-8, does it show that any salt herring was discharged?

A. Yes. We discharged herring that day. [334]

Q. From what hold?

A. No. 4, lower hold.

Q. How much herring, if you can tell us?

A. How much we discharged?

Q. Yes.

A. There was 110 quarter-barrels, and 277 half-barrels.

(Testimony of James A. Damalin.)

Q. At what time of day was that brought out of the ship?

A. That was from 1:45 o'clock to 3:45.

Q. Mr. Damalin, referring to Exhibit A-8, what other cargo besides the herring was discharged from Number 4 lower hold? A. Canned salmon.

Q. Was there anything else?

A. That was all.

Q. Was there anything else in Number 4 lower hold? A. Not when I went down.

Q. Did you observe the general condition of Number 4 lower hold with respect to the stowage of the herring and the salmon?

A. Well, it was well stowed.

Q. It was well stowed? A. Yes.

Q. In what portion of the Number 4 lower hold was the herring stowed? [335]

A. Between the shaft alleys.

Q. Can you tell us from your recollection, was this date September 25th, 1946,—was that the first day that any ships worked after the termination of the strike? A. I am quite sure it was.

Q. Have you been in Number 3 lower hold on the Denali on other occasions? A. Yes.

Q. Have you been in that hold for discharging barrels of salt herring?

A. Yes, I had.

Q. What, in your opinion, Mr. Damalin, based on your experience and your observation from being in these holds over the period of time you have described as having acted as stevedore, would

(Testimony of James A. Damalin.)

you say of Number 3 lower hold in the summer-time as to whether or not it was a warm or a hot cold or whether it was cool?

A. I have always found it cool.

Q. Is Number 3 lower hold below the water line? A. Yes.

Q. What would you say with respect to Number 4 lower hold with the same conditions as Number 3? A. I would say about the same.

Q. What function do you perform on loading the vessel northbound when the vessel leaves Seattle for Alaska; [336] do you do any of that?

A. Yes.

Q. What work do you perform in connection with loading the vessel?

A. Well, it would be the same; you are down in the hatch and you put the stuff away properly.

Q. Do you determine where to put it?

A. Well, as a rule the ship foreman tells you where he wants it and then you put it there.

Q. Do you mean Mr. Hanson?

A. Well, whoever has got charge of the ship.

Q. But you actually direct the place where the cargo is put? A. That is right.

Q. Direct the longshoremen where to put it?

A. That is right.

Q. In your opinion, would such cargo as citrus fruits and eggs and lard and tomatoes, onions, potatoes,—would those cargoes be in your opinion subject to damage by any amount of heat?

A. No.

(Testimony of James A. Damalin.)

Q. I say would they be damaged by heat?

A. Oh, yes.

Q. And would you say that the character of those cargoes I have enumerated is similar to salt herring with [337] respect to heat damage?

A. Do you mean whether the heat would damage them?

Q. Yes. A. I would say that it would.

Mr. Hamlin: If the Court please, I don't think this witness has been qualified to testify as to the chemical action caused by heat to such cargo.

The Court: I will sustain the objection with leave to qualify the witness.

Q. (By Mr. Wakefield): Mr. Damalin, in your opinion, and with regard to Number 3 lower hold, is it proper to stow those items which I have enumerated in number 3 lower hold?

A. I would say yes.

Mr. Hamlin: That is objected to. It is merely another way of getting at the same thing.

The Court: I believe in view of what the witness has said as to his experience that the question is proper and the objection is overruled.

Q. (By Mr. Wakefield): In actual practice in respect to August and September, 1946, did you stow such cargoes in Number 3 lower hold? [338]

A. Yes.

Mr. Hamlin: That is the same type of question to which an objection was sustained yesterday. I don't think it is at all material. It is not any-

(Testimony of James A. Damalin.)

thing that tends to prove the defense of the carrier. It is not pleaded. It is not material.

The Court: I am going to sustain this objection subject to the same condition which I stated yesterday. If counsel on showing the court authority which the court feels controls, and I will add today persuades this court to a different conclusion, I will be the first to change my position upon it and to indicate a willingness to do so, if I am reminded of the authorities which justify it.

The objection is sustained.

Q. (By Mr. Wakefield): Mr. Damalin, from your experience in handling cargoes aboard vessels and particularly the Denali, is there any characteristic of canned salmon in cartons or otherwise which generates or causes any heat of any kind?

A. No.

Q. In connection with Number 3 lower hold, what has been your experience in going into that hold as to whether or not in the summertime the Number 3 lower hold will [339] be warmer or cooler than the outside atmosphere?

A. Why, it is cooler.

Q. Is the same thing true of Number 4 lower hold?

A. Yes.

Q. You are actually down in the hold, are you, while these cargo operations are going on?

A. All of the time.

Q. Do you stay down there all of the time?

A. All of the time.

(Testimony of James A. Damalin.)

Q. In discharging Number 3 lower hold, have you had any experience as to the shaft alleys; what can you tell us about the shaft alleys as to whether you have ever found them warm or whether they are cool?

A. Well, now, when they are loading down there I usually stay on the shaft alley.

Q. Do you mean you stand on the shaft alley?

A. Yes; because it is quite a climb to get from one to the other; and I have never found them warm yet.

Mr. Wakefield: I offer Respondent's Exhibit A-8 in evidence.

Mr. Hamlin: No objection.

The Court: That is admitted.

(Respondent's Exhibit A-8 received in evidence.) [340]

Mr. Wakefield: No further questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Hamlin:

Q. Mr. Damalin, referring to Number 4 lower hold on the Denali, which you superintended unloading on September 5, 1946, I ask you whether or not the barrels of salt herring belonging to Apex Fish Company, which were stowed in the lower hold were over-stowed with any other material?

A. Well, there was a little bit of salmon on top of it.

(Testimony of James A. Damalin.)

Q. How was that on top; was there dunnage on top of the kegs? A. Yes.

Q. How many tiers of canned salmon were on top of the barrels?

A. It wasn't over five or six at the most.

Q. Five or six tiers high?

A. Just in the square, yes.

Q. How far did those extend over the top of the herring; did they extend from each shaft alley?

A. Just about.

Q. Was any piled over the top of the shaft alley and [341] extending out into the wings?

A. No; there was salmon in the wings but not on top. This we took out was just even with the shaft alley.

Q. About how high are those shaft alleys from the top of the deck?

A. I would say between six and a half and seven feet.

Q. These times you mentioned when you were standing on the top of the shaft alleys, you were wearing shoes, of course? A. Yes.

Q. Was this shortly after the ship had been in operation; that is, moving in the water, or had she laid dead at the pier for some time when you mentioned standing on top of the shaft alleys?

A. Well, I have been down there a good many times.

Q. Have you ever been there right at the conclusion of a voyage?

(Testimony of James A. Damalin.)

A. Well, I don't know about that. I have been down there as quick as she comes in on lots of times when we start discharging down there.

Q. Do you recall standing on the top of the shaft alleys immediately after the end of a voyage?

A. I have at different times, yes.

Q. You didn't feel any warmth on those occasions? [342]

A. Not any more so than normal.

Q. How do you get up on top of the shaft alleys?

A. There is a ladder that goes around both ends.

Q. That goes directly to the center of the top, doesn't it?

A. There is a ladder that comes down the 'tween deck and then you get down from there to the shaft alley. If you have to get to either side—either wing—then you naturally have got to climb up and down the other side again.

Q. Do you know where those steam pipes pass through the shaft alleys? A. No, I don't.

Q. When you stand on the shaft alleys you are of necessity on top of them, are you not?

A. Yes.

Q. They are a curved surface on top?

A. Yes.

Q. So that there is only one place where you can stand and that is at the top of the arc which the top forms, is that not true?

A. That is right.

(Testimony of James A. Damalin.)

Q. Where does the ladder go down,—on the in-board side or the outboard side of the shaft alley?

A. Do you mean from the 'tween deck? [343]

Q. No. When you are on top of a shaft alley and you want to get down to the deck.

A. Well, it comes all the way around on both sides.

Q. I don't think I understand you. These two shaft alleys are humps that run parallel fore and aft on the ship, isn't that true?

A. That is right.

Q. It is possible to get from the top of the shaft alleys down into,—under the floor of the hold, either between the shaft alleys or on the wing side. Does the ladder go down to both sides, is that what you mean to say? A. Yes.

Q. If you are on the other side of it you have to get between the shaft alleys.

Mr. Hamlin: That is all.

Mr. Wakefield: No further questions.

The Court: Step down.

(Witness excused.)

The Court: Call the Respondent's next witness.

Mr. Wakefield: If the Court please, before proceeding with further witnesses I would like [344]—if it is agreeable to the Court—at this time to file a memorandum which I prepared. I hope I wasn't too sleepy to be coherent. I would like to file it and serve counsel with a copy and address my remarks to the matter.

The Court: You would like the Court to become familiar with the matter so as to be in an at-

titude of mind to best receive your arguments, would you not?

Mr. Wakefield: Yes, your Honor.

The Court: Has counsel for the libelant changed his position?

Mr. Hamlin: No, Your Honor, I feel even more strongly on it.

The Court: I assume counsel for the respondent has not changed his position.

Mr. Wakefield: No, indeed. I likewise feel more strongly about my position.

The Court: I would like counsel to give me the citation of the case—if there is any such—or cases which you think control this court's action on these questions, particularly this one question which was prominently emphasized yesterday afternoon. Then during the noon hour I would like to consider these things. [345]

I will hear the argument this afternoon.

Mr. Wakefield: The memorandum I have filed does contain cases cited there.

The principal one, I think, is the Ramgoon Marue by the Second Circuit.

The Court: Where is that cited?

Mr. Wakefield: On page 4, Your Honor.

The Court: Page 4, near the top of the first third.

(Discussion between the court and counsel re authorities.)

The Court: Court will be at recess until 2:30 this afternoon.

(At 12:00 o'clock, noon, Thursday, July 15th, 1948, proceedings recessed until 2:30 p.m., in the United States Court House.] [346]

Seattle, Washington

July 15, 1948, 2:30 o'Clock P.M.

(All parties present as before.)

The Court: Mr. Wakefield, when you are ready you may proceed now.

(Argument by Counsel to the Court Re Admissibility of Evidence.)

The Court: What the Court yesterday said and ruled respecting prior shipments on specific voyages will stand.

The Court is of the opinion and rules, and confirms the ruling made yesterday, that evidence of particular voyages and the results thereof may not be introduced.

The Court now is of the opinion, however, that it is competent and permissible for respondent to ask an expert witness of proven qualification whether or not the stowage in this instance was in accordance with the standards of good stowage ordinarily [347] practiced in the trade.

If I said anything or ruled as to a particular question and answer yesterday in a manner inconsistent with this present opinion upon that matter, what the Court said yesterday is amended accordingly. In other words, it is competent for Counsel to ask a qualified expert witness if the

stowage in this case here in question was in accordance with the accepted standards of good stowage.

You can again look over the questions and answers in this connection and see if the court yesterday excluded that when to have done so was in conflict with the court's present opinion just now expressed. If so, I will permit you to go into that again.

Mr. Wakefield: If the Court please, for the record the respondent requests an exception to that portion of the ruling which excludes the testimony of what carrying the same commodity on other voyages would show.

The Court: Allowed.

Mr. Wakefield: May I at this time resume the reading of the deposition?

The Court: Yes.

Mr. Wakefield: I believe, Your Honor, that [348] beginning on page 17 of the deposition—

The Court: I have before me page 17 of the deposition of Arne Burns. Is that the former Chief Officer?

Mr. Wakefield: That is, Your Honor.

The Court: I am looking at line 17. Do you wish me to look at some other line?

Mr. Wakefield: I was going to say that the objection was made to the question on Line 9.

The Court: Line 9. Do you wish to propound that question and read the answer?

Mr. Wakefield: Yes. I am not certain whether that falls within the prohibition of Your Honor.

The Court: I am going to allow that question and answer to be read.

As to custom, I am inclined to think it falls within the expression of the Court's last expressed opinion. You may read it.

Mr. Hamlin: May the record show an exception on the part of Libellant?

The Court: Allowed.

“Q. (By Mr. Wakefield): Would you say it [349] was customary to carry barrels of herring in Number 3 and Number 4 lower holds on the Denali? A. Yes.”

Mr. Wakefield: Exhibit A-5 has been marked and identified.

I have offered it in evidence and Your Honor reserved ruling on that. I take it that it would not be admissible under the Court's ruling.

The Court: I wish you would renew your statement as to your position on that offer.

Mr. Wakefield: If the Court pleases, the exhibit Respondent's A-5 which is now offered pertains to Voyage 54 of the Denali which has been testified to already as having been the immediately preceding voyage of the vessel not more than 30 days prior to the voyage in question in this suit.

This exhibit is the hatch list which shows 924 half-barrels of salt herring from Port Wakefield, belonging to the same libellant, stowed in Number 3 lower hold between the shaft alleys,—it is lower hold, center.

The exhibit also shows with respect to the balance of the cargo in that hold that it consisted of frozen

halibut and cans of salmon, the same as in [350] our present case.

The frozen halibut, of course, was in the Number 3 'tween deck and it is so indicated. The lower hold of Number 3 on this exhibit had already the same amount of herring as a matter of fact,—924 half-barrels as against 971 in the case on trial.

It is my contention that this exhibit shows the carriage of that herring in the summertime in the same place in the same quantity and with the same kind of other cargo, namely, canned salmon.

I would say to Your Honor that we are prepared to prove, if this exhibit is admitted, that there was no damage or claim resulted from this shipment on Voyage 54. It is offered also to show proper stowage and customary stowage of that commodity in that same space.

Mr. Hamlin: The offer of this exhibit is objected by the libelant on the ground that it is not material, that it is not within any of the issues of the case and that it is in contravention of the Court's ruling just made upon the argument of counsel upon this entire question. It is also my recollection that this exhibit was offered, argued and refused yesterday. [351]

The Court: The Court feels it comes within the ruling of the court as to particular shipments announced a few months ago and announced yesterday. Therefore, the Court applies the same ruling to this exhibit and sustains the objection to it and declines to receive the same in evidence. I feel that it would be practically impossible on shipments be-

tween here and Alaska to establish like conditions on each voyage or on other voyages with any comparison to the conditions which were prevailing and affecting the shipment in question in this litigation.

Mr. Wakefield: In view of the Court's ruling with respect to Respondent's Exhibit A-5, I believe that the questions following on the balance of page 17 and page 18 and down to line 11 on page 19 may be omitted as they all pertain to that specific shipment on Voyage 54.

The Court: Will you indicate where you wish Counsel reading the questions to commence reading again?

Mr. Wakefield: On page 19, line 11.

The Court: You may proceed.

“Q. (Mr. Wakefield, reading): Mr. Burns, what can you tell us with respect [352] to other perishable cargoes carried in Number 3 or Number 4 lower holds?”

Mr. Hamlin: To which the libelant objects as likewise not material. If it is improper to show specific shipments on previous voyages, it is even more immaterial on identical voyages such as those in suit herein.

The Court: I do not think it is proper to go into that over objection. The objection is sustained.

Mr. Wakefield: Well, if the Court please, in view of that ruling, I would like to make for the record an offer of proof by this witness with respect to both matters.

(Deposition of Arne Burns.)

The Court: You may do that.

Mr. Wakefield: First, with respect to Respondent's offered Exhibit A-5 which was rejected, to prove that on the voyage immediately preceding the one in question in this suit not more than thirty days prior thereto that the Denali loaded and successfully carried in Number 3 lower hold 924 half-barrels of herring from Port Wakefield to Seattle, being the same place from where the cargo in question was loaded and that it is customary on the [353] Denali to carry herring in Number 3 and Number 4 lower holds.

The respondent further offers to prove by this witness that it is customary and proper and frequently done to carry perishables in Number 3 and Number 4 lower holds on the northbound voyage from Seattle to Alaskan ports and that such perishables consist of such commodities as fresh apples, lemons, oranges, bananas, potatoes and onions, butter, eggs, and shortening or lard.

Mr. Hamlin: To which the libelant makes the same objection as was addressed to the specific question.

The Court: The objections are sustained. The Court rejects the offer of proof.

Now I take it you might appropriately skip to line 5 on page 20.

Mr. Wakefield: Yes, Your Honor. I was going to suggest that.

Commencing on line 5, page 20, Your Honor:

"Q. On Voyage Number 55, from Port Wakefield to Seattle, between August 23rd and Septem-

(Deposition of Arne Burns.)

ber 4th, 1946, did anything unusual happen aboard the ship which would in any way account [354] for any heat or other adverse conditions in either Number 3 or Number 4 lower holds?

“A. No. Everything was normal operation.”

Mr. Wakefield: I think now, Your Honor, we can skip to Line 23 on the same page.

The Court: That would seem appropriate to me.

Mr. Wakefield (Reading):

“Q. At the time you loaded the barrels of herring at Port Wakefield in Number 3 and Number 4 lower holds, was Mr. Wakefield present during the loading? A. Yes.

“Q. You know him, do you? A. Yes.

“Q. And he saw where this cargo was being stowed? A. Yes.

“Q. Did he at any time make any comment or objection to that stowage?

“A. Not that I remember.

“Q. Mr. Burns, in your opinion, and based upon your experience with herring and the carriage of it, I will ask you whether you believe that [355] Number 3 and Number 4 lower holds were proper place to stow the barrels of herring? A. Yes.

“Q. On this voyage Number 55, will you tell us when the Denali arrived in Seattle? You can refer to the log book, if you do not remember.

“A. Yes.

“Q. I mean arrived at Bell Street Terminal, which was the destination of this Port Wakefield cargo, as shown on Respondent's Exhibit A-2?

(Deposition of Arne Burns.)

“A. At eighteen forty fast at Bell Street. It does not give the date.

“Q. I noticed that, but I call your attention to the preceding date. What is the preceding date?

“A. It is September 3rd.

“Q. So it is correct to say, in view of the notation in the log book, that that date would be the 4th? A. It appears so, yes.

“Q. It would appear to be September 4th?

“A. Yes, sir.

“Q. And eighteen forty is 6:40 p.m., is it not?

“A. Yes.

“Q. After arrival at Bell Street Terminal at 6:40 p.m., on the 4th of September, 1946, did you [356] remain aboard the ship or did you leave the ship as a result of a general strike?

“A. We left the ship on account of the strike.

“Q. When did the strike begin?

“A. To my recollection, we left the following day.

“Q. That would be what date?

“A. That would be September 5th.

“Q. And at the time you left the ship, Mr. Burns, as a result of the strike, did everybody leave, or just some of the crew?

“A. Everybody.

“Q. Do you know whether or not the ship was picketed after that, or at that time? A. Yes.

“Q. Here in Seattle, and at the Bell Street Terminal? A. Yes.

“Q. Do you have charge of the discharging of the ship, or is that done by somebody else?

(Deposition of Arne Burns.)

“A. That is done by the stevedore foreman.

“Q. So you do not actually know about the discharge of this herring, or other cargo, from the Denali? A. No.

“Q. Did you go back on the Denali after the strike? A. No. [357]

“Q. Can you tell us from your own recollection about how long the strike lasted on this occasion?

“A. I believe the strike was over about December 20th. I was in Portland before the strike was over.”

The Court: Is that statement necessary?

Mr. Wakefield: No, Your Honor.

(Court and counsel referring to statement in deposition offering exhibits in evidence.)

The Court: Go to the place where you feel you pick up the material part of the record.

Mr. Wakefield: I believe the cross-examination is next, Your Honor.

The Court: Will someone read the first question?

“Cross-Examination

“By Mr. Hamlin:

“Q. Mr. Burns, before you left the ship on account of the strike at Seattle, on the 5th of September, 1946, had any portion of this Port Wakefield shipment of salt herring been discharged [358] from the Denali?

“A. The ship was tied up at 6:40 p.m., and we left the ship. We had to leave the ship. We only worked until 5:00 p.m., and then the relief mate

(Deposition of Arne Burns.)

came on, and I left at 5:00 p.m. So I wasn't there when any discharge operation was handled.

"Q. Do you mean by that that so far as you know, you do not know whether any of it was discharged or not? Is that what you are trying to say?

"A. As I recollect now, I will not state definitely what day we got off, whether it was the 5th or the 6th. I do not recollect. I remember that the following day I was out on the dock, and there was some herring that was already discharged. If we got off the ship the 5th or 6th, it must have been the 6th, because I remember being out there and seeing it. So it must have been the 6th that we got off.

"Q. Your duties, including superintendence over the discharging of the cargo, ended at Seattle, did they not? A. No.

"Q. That is not part of your work?

"A. No; that is not part of my duties. [359]

"Q. Did you have occasion to inspect any of those barrels that you saw on the dock, that you mentioned a minute ago?

"A. I happened to be out there on the dock, and I went over there, and I saw some barrels was half opened. They were inspecting some of the barrels then.

"Q. Were they some of this Port Wakefield shipment, from Number 3 and Number 4 lower center holds? A. Yes.

"Q. Were you able to observe anything about the condition of the contents?

"A. No, I merely looked as I walked by.

(Deposition of Arne Burns.)

“Q. Did you ever learn directly whether or not any of that shipment was in damaged condition when it was discharged?

“A. Pardon me——

“Q. Did you ever learn directly that any portion of that Port Wakefield shipment was in damaged condition when it was discharged? A. No.

“Q. Can you recall about how many barrels you saw on the dock that had been discharged before you left the ship on account of the strike?

“A. No. [360]

“Q. Taking you back to the day you left Port Wakefield—I think that was August 24th, wasn’t it?

“Mr. Wakefield: August 28th.”

Mr. Wakefield: It was the 24th, Your Honor.

“Q. (Continuing): Where was your next stop after leaving Port Wakefield? A. Port Vita.

“Q. What kind of an operation is carried on at Port Vita?

“A. We were discharging cargo and loading cargo.

“Q. I mean is it another herring plant?

“A. It is another herring plant.

“Q. What did you pick up there?

“A. Herring.

“Q. Was it salt herring, in barrels?

“A. Yes.

“Q. Was any portion of the Port Vita shipment on the dock when you arrived?

“Q. Yes.

“A. In Port Vita?

(Deposition of Arne Burns.)

“A. I do not recollect. I do not remember. I believe so, but I do not remember for sure. I [361] believe it was; yes.

“Q. Do you remember about how many barrels you picked up there?

“A. I will have to look at the cargo plan.

“Q. Will you look at the cargo plan, please?

“A. (Witness examines cargo plan.) It was over one thousand barrels.

“Q. Based on your experience in this trade, I will ask you whether or not it is customary for the herring plants to place as many barrels as they can on the dock shortly before the vessel arrives?

“A. I believe the reason they put them out on the dock is on account of shortage in the warehouse, shortage of space in the warehouse.

“Q. Have you ever seen it done when the warehouse was partially empty?

“A. No. I am not familiar with their operation. Just what they do, I do not know.

“Q. Is it not true that this is done as a custom by the herring operators up there, in order to facilitate loading, and not detaining the ship any longer than necessary?

“A. No. I do not believe that is the reason. I believe the reason is that the warehouse is [362] full, and they have no other vacant space, and in order to keep on operating they will have to stow them on the dock. That is my understanding that I have had from my previous experience up there.

“Q. Did you inspect the warehouse at Port

(Deposition of Arne Burns.)

Wakefield when you arrived on the 23rd of August, 1946, and ascertain whether or not their warehouse was at that time full to capacity?

“A. No.

“Q. Generally, was the weather the same at Port Vita the day you arrived there as it was at Port Wakefield, that you had left shortly before?

“A. Yes. We had immediately arrived at Port Vita. The weather must have been the same; yes.

“Q. What is the running time between those two places?

“A. They are right together; about a couple of miles.

“Q. Number 3 and Number 4 holds are forward of the house on the ship, are they not?

“A. The after part.

“Q. They are aft? A. Yes. [363]

“Q. Which way is the compartment for the crew?

“A. The Crew Department is forward. That is, the Deck Department. The Steward's Department is aft.

“Q. That is where the Stewards live?

“A. The Stewards' Department, yes.

“Q. Are those quarters heated?

“A. Yes, I believe so. I assume so.

“Q. How are they heated?

“A. I don't know. I don't remember.

“Q. To refresh your recollection, are they heated by steam?

“A. Well, I don't remember. It is possible, but I do not remember.

(Deposition of Arne Burns.)

“Q. Do you remember of any steam pipes which passed through the shaft alley and back in the general direction of those quarters, on the Denali?

“A. I don’t know.

“Q. Have you ever had occasion to enter either of the shaft alleys of the Denali?

“A. I don’t remember if I have. I don’t remember that I did.

“Q. You do not know what is inside them?

“A. No; I don’t know. [364]

“Q. Do you know how thick the steel housing is covering the shaft alley?

“A. Outside, one-half inch, or three-eighths inch, or one-half inch.

“Q. Is there insulation over the shaft alley?

“A. No; not there.

“Q. How long have you sailed, Mr. Burns?

“A. Altogether?

“Q. Yes. A. Twenty-two years.

“Q. Can you state whether or not it is usually warm inside the shaft alley?

“A. No. I have been in shaft alleys on other ships, but I haven’t noticed any warmness.

“Q. You never noticed any warmness?

“A. No.

“Q. Was any record kept of temperatures in Number 3 and Number 4 lower holds, on Voyage Number 55, after leaving Port Wakefield, and before arriving at Seattle? A. No.

“Q. I believe you stated that you entered these holds periodically as loading operations were com-

(Deposition of Arne Burns.)

pleted, on your trip from Port Wakefield down to Seattle; is that correct? [365]

“A. No. Just during loading operations,—just during loading and discharging operations.

“Q. Referring to the log book, will you tell us how many such loading operations occurred, and the date of each, between Port Wakefield and Seattle? A. In those particular holds?

“Q. Yes. And I am referring to what has been marked as Respondent's Exhibit A-1, the log book.

“A. I cannot say from this book. You see, on the ship when we have to work cargo we have special books. This book here is just pertaining to the running of the ship, the time you arrive and the time you leave. This book does not give that.

“Q. Can you do that by comparing your log book, marked Respondent's Exhibit A-1, with what has been marked as Respondent's Exhibit A-3, the cargo stowage plan?—or perhaps Respondent's Exhibit A-2, the hatch plan?

“A. (Witness examines exhibits.)

Hatch Number 3, at Moser Bay—it doesn't give the date on this one.

“Q. Does your log book show when you stopped [366] at Moser Bay?

“A. On August 28th. Shearwater Bay, August 27th. That is all in Number 3.

“Q. How about Number 4?

“A. Port Bailey, August 24th and 25th. That is all for Number 4.

“Q. So that from August 25th to the date of your arrival in Seattle, at 6:40 p.m., on September

(Deposition of Arne Burns.)

4th, you did not enter Number 4 lower hold, is that correct? A. That is correct; yes.

“Q. From August 28th, leaving Moser Bay, until your arrival in Seattle on September 4th, you did not enter Number 3 lower hold, is that correct? A. That is correct.

“Q. When these barrels were stowed at Number 3 and Number 4 lower holds, at Port Wakefield, on Voyage Number 55, do you recall whether or not thereafter they were ever over-stowed with any other material?

“A. In Number 3 they were clear, I know. In Number 4, I do not recollect. And I cannot quite see on the cargo plan if there was salmon on top or not. It is not quite clearly given, the picture [367] here on that.

“Q. There were cartons of canned salmon in Number 4?

“A. Yes. I do not recollect now whether there was salmon on top or not.

“Q. Where else would you put it in Number 4? Is there any other place?

“A. Well, you have the two wings.

“Q. Over the housing, you mean?

“A. Over the side of the housing, in the two wings, outside.

“Q. Does your cargo stowage plan indicate what was down in the wings? A. Salmon.

“Q. Exhibit A-3 shows salmon in the wings, is that correct? A. Yes.

“Mr. Wakefield: Which hold are you talking about?

(Deposition of Arne Burns.)

“Mr. Hamlin: I am talking about Number 4.

“Q. (By Mr. Hamlin): What does it show in the center? A. It shows herring.

“Q. Nothing else?

“A. That is all it shows on the cargo plan; yes.

“Q. Where was that salmon taken on which is shown [368] on Respondent's Exhibit A-3, the cargo stowage plan? A. Pier 24.

“Q. That was taken on at Pier 24?

“A. No. It was taken on at Port Bailey.

“Q. And that is a stop between Seattle and Port Wakefield, is it not? A. Yes.

“Q. What else was out in the wings?

“A. That is all.

“Q. Just that salmon? A. Yes.

“Mr. Wakefield: These last few questions have referred to Number 4 lower hold?

“Mr. Hamlin: Yes, sir.

“The Witness: Yes, sir.

“Q. (By Mr. Hamlin): Calling your attention to Voyage Number 54 of the Denali, which you indicated left Seward on or about July 28th, 1946, and for which you have a hatch list here marked as Respondent's Exhibit A-5, can you tell whether or not the 924 barrels of salt herring in Number 3 lower hold center were over-stowed, on Voyage Number 54, with any other material?

“A. I do not remember.” [369]

The Court: Do you wish to go into that?

Mr. Hamlin: No, I do not, Your Honor.

“Q. (By Mr. Hamlin): Would you say from your experience that over-stowing would ever have a tendency to accelerate heat damage to cargo?

(Deposition of Arne Burns.)

“A. I never have had experience to that effect.

“Q. Did you ever enter Number 3 or Number 4 lower holds after the vessel docked in Seattle, at the conclusion of Voyage Number 55? A. No.

Mr. Hamlin: I notice that these questions are predicated upon the possibility that the direct testimony was admitted in evidence.

I think we should skip from Line 9, page 34, through the balance of the page 34 down through line 8 on page 35,—commencing on line 9 on page 35.

“Q. Is there any other officer or member of the crew on the ship whose responsibility it is to see to the proper stowage of cargo?

“A. Well, I am fully responsible and in charge. Then, if it happens that I would be off [370]for a time, and I go to bed, then whatever officer is on deck is in charge, and they consult me.

“Q. On any of these questions when you entered Number 3 lower hold, after leaving Port Wakefield, such occasions being on August 27th, at Shearwater Bay, and on August 28th at Moser Bay, did you inspect these shaft alleys, or the area around the herring, to ascertain whether or not it was getting warm there?

“A. I never noticed any excess. Everything was normal, as I recollect.

“Q. Did you feel the housing of the shaft alley?

“A. Yes. I was walking out there and put my hand on it to get up on top of it. Like when you

(Deposition of Arne Burns.)

go out on top of the wing, you put your hand on it, and walk along it.

“Q. Do you recall whether it was warm or cold?

“A. It was neither ice cold nor warm.

“Q. On the occasions when you entered Number 4 lower hold, on August 24th and August 25th, at Port Bailey, did you inspect the cargo of salt herring from Port Wakefield, and the shaft alleys in the holds, to see whether or not they were warm?

“A. The same condition as Number 3.” [371]

Mr. Hamlin: I stated that I had no other questions and Mr. Wakefield replied the same.

The Court: This deposition so far as the questions and answers have been read and received in evidence is now received in evidence as a part of the Respondent's case in chief.

Mr. Wakefield: I would like to call Mr. Gow.

The Court: You may do that. Come forward and be sworn.

JAMES C. GOW,

called as a witness by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Wakefield:

Q. Will you state your name, please?

A. James C. Gow.

Q. What is your occupation, Mr. Gow?

A. Marine Surveyor.

Q. You are the President of Alexander Gow, Incorporated?

(Testimony of James C. Gow.)

A. Alexander Gow, Incorporated.

Q. How long have you been engaged in the business of [372] marine surveying?

A. Twenty-six years.

Q. Has that been largely in the Port of Seattle?

A. Yes, sir.

Q. And other Puget Sound ports?

A. Yes, sir.

Q. Has your marine surveying included the surveying of ships and cargoes engaged in the Alaska trade?

A. Yes, sir.

Q. How frequently do you do work of that kind?

A. Our work in connection with that is being called in when any damage has occurred to cargo or where the operator wants an opinion on loading the cargo.

Q. In your total experience, Mr. Gow, as a marine surveyor, what would you say as to whether or not you have done more cargo damage work or more hull work or what would you say?

A. I have done I would say more cargo work.

Q. That you would say is your particular specialty.

A. Yes, sir.

Q. Are you familiar with the carriage of fish from Alaska to Seattle, including salmon, herring and other types of fish cargoes?

A. Yes, sir.

Q. Have you had occasion to survey damage to herring [373] and damage to salt salmon and canned salmon?

A. Yes, sir.

The Court: What is the most notable cargo surveying experience you have had, Mr. Gow?

(Testimony of James C. Gow.)

The Witness: What was that, sir?

The Court: What is the most notable recent cargo surveying,—damage surveying you have had?

The Witness: The most recent one was in connection with the Diamond Knot.

The Court: What, briefly, was the nature of that?

The Witness: My position in that connection was to work with the salvor to determine whether or not the cargo could be raised, and whether or not, after it has been raised, the cargo can be put in condition to return a value.

The Court: What were the salient conditions in connection with that situation in which you have worked?

The Witness: In this particular case the ship was sunk in 135 feet of water.

The Court: Where?

The Witness: Off of Point Crescent Bay, 15 miles west of Port Angeles.

The Court: In the State of Washington? [374]

The Witness: Yes, sir.

The Court: In what waters was it?

The Witness: In the Strait of Juan de Fuca.

The Court: Was it large or small?

The Witness: It was a large cargo of a value of one and one-half million dollars.

The Court: You may inquire.

Q. (By Mr. Wakefield): Mr. Gow, as to the value of the herring in this case, did you at the request of the Alaska Steamship Company inspect

(Testimony of James C. Gow.)

this cargo of herring after it was discharged in Seattle? A. Yes, sir.

Q. Can you tell us when you made your inspection?

A. I made an inspection on the morning of the 5th of September and in the afternoon of the 5th of September, and then subsequent days after that.

Q. The inspection was for what purpose?

A. The purpose was to determine its condition. There was alleged damage to the herring. When the barrels were opened up, I was there when they were opened and looked at the fish and listened to the complaints and looked at the fish itself.

Q. Was the herring all damaged?

A. The herring that I saw was damaged, yes, sir. [375]

Q. Could you tell from inspecting it what had been the cause or probable cause of the damage?

A. No. You could tell that the flesh had pulled away from the meat. The general opinion was that it had been a heated condition.

Q. Was that your opinion or did you have any other opinion as to the possible cause?

A. There are several things in my mind that can happen to herring or to any other fish. If it is properly cured and if when caught it is perfectly fresh, then a heat condition could produce the conditions that we found there. But again on the other hand, if the fish was not fresh in the first place or hadn't been properly cured, it would have given the same indication.

(Testimony of James C. Gow.)

Q. So you were not able to tell from your examination on September 5th, just what the cause of damage was? A. No, sir.

Q. Was Captain Perry down there during the time you were down there?

A. Yes, sir, I saw Captain Perry there at the time.

Q. Was Mr. Pete Wahl there?

A. Yes, sir.

Q. Mr. Gow, what, if anything, did Pete Wahl want to do with this entire shipment; what did he tell you [376] or indicate he wanted to do?

A. I questioned Mr. Wahl as to the extent of damage.

Mr. Hamlin: If Your Honor please, this sounds like hearsay.

The Court: You cannot have him state what he said to Captain Wahl or what Captain Wahl said to him, can you, without violating the hearsay rule?

Mr. Wakefield: We have his report in evidence which violates the hearsay rule, I think. This just goes to his credibility.

The Court: Is his report in evidence?

Mr. Hamlin: Mr. Wahl's report is in evidence.

The Court: Will you take that exhibit and have it before you?

You may inquire about such subject matter as is mentioned in statements in the Survey Report, if that is your survey report now in evidence. I have some doubt about whether it is in evidence.

(Testimony of James C. Gow.)

Mr. Crutcher: We have a copy, Your Honor.

The Court: What is the number that the clerk has given it as a Clerk's exhibit?

Mr. Crutcher: It is Libelant's Exhibit Number 12.

The Court: This is Peter Wahl's report. The Court has admitted that in evidence. [377]

Mr. Wakefield: The question I am propounding, Your Honor, will have to do with testing the qualifications of this witness to express an opinion. Your Honor will recall that at the time this was offered I objected on the ground that the witness was deceased and this was hearsay,—particularly so as to any opinion he might have expressed. My question to Mr. Gow, now, will bear on the question of his qualification to express an opinion on this subject.

The Court: I will hear the question.

Q. (By Mr. Wakefield): What, Mr. Gow, did Pete Wahl want to do with this shipment?

Mr. Hamlin: That is objected to on the ground that it is a violation of the hearsay rule. It is hearsay by conduct and it necessarily requires that this witness repeat a hearsay statement made to him by Mr. Wahl. That is not in the same class as a report of Mr. Wahl, and it is not a question having to do with any statement contained in Mr. Wahl's report which was admitted in evidence by the court under an exception to the hearsay rule permitting the receipt in evidence of memoranda made by an agent of a person party to the present

(Testimony of James C. Gow.)

litigation in the [378] ordinary course of business. That was the ground for Exhibit 12.

There is no exception permitting this witness to quote a hearsay statement made by Mr. Wahl or any other person in this kind of a situation.

The Court: Did you wish to make a statement for the record?

Mr. Wakefield: Yes, Your Honor. I think where I am deprived of the right of cross-examining the witness I certainly ought to be able to impeach his credibility or rather his ability or his qualification to express an opinion. I could certainly do so if he were here.

The Court: In connection with that matter, you can ask him what, if anything, Peter Wahl said about his own qualifications. If you seek to show some statement made by Wahl that related to the question and has a direct bearing on Peter Wahl's qualifications, which you question and have already questioned in the record as the basis for admitting an exhibit.

Mr. Wakefield: Maybe I could assist the court and counsel by stating that Mr. Gow's testimony will be that Pete Wahl wanted to dump the whole shipment in the Bay and it was only over Mr. Gow's [379] objections that the shipment was not dumped and as a result they realized \$10,000 salvage. I think that is highly material to raise a question as to Pete Wahl's qualification to express an opinion.

(Testimony of James C. Gow.)

The Court: What did Peter Wahl say in that Libellant's Exhibit 12 which bears upon the subject of whether or not Peter Wahl did want to dump them in the bay? Is there anything said in that exhibit which is inconsistent with his wanting to dump them into the bay?

Mr. Wakefield: He says, first:

"Upon inspection we found the herring showed signs of heat and immediately investigated further," and so forth.

Then, in the last paragraph he says, "The entire lot put in storage put in storage shows evidence of having been stowed in a warm place, some showing it more markedly than others."

The Court: He may have wanted to dump it all in the bay and he may or may not have been unwise in wanting to do that. But still even if he wanted to do that, he may still be qualified to make an inspection.

The objection is sustained. [380]

Q. (By Mr. Wakefield): Mr. Gow, after you had inspected some of the barrels on September 5th, was any further inspection made of all of the shipment?

A. Yes. The barrels were opened up. They were in tiers along one end of the shed and along the side. Mr. Wahl and myself went over them and he took out fish for my inspection. I asked him if he would bring up fish from the center of the barrels as well as from the sides of the barrels.

(Testimony of James C. Gow.)

He pointed out to me why the fish was considered spoiled.

Q. Did he consider that all of it was spoiled or did you all agree that there was some salvage available?

A. In the first remark Mr. Wahl made he said it. I asked him——

Mr. Hamlin: That is objected to as calling for hearsay.

The Court: Is there any reason why the hearsay rule doesn't apply to exclude this?

Mr. Wakefield: I think it would except for the exhibit.

The Court: What is there in the exhibit that you are now asking this witness concerning?

Mr. Wakefield: I am referring to Exhibit 12 which is in evidence.

The Court: What statement in there makes this [381] question admissible?

Mr. Wakefield: I don't quite understand.

The Court: Is there some statement made in the exhibit which you seek by this question to contradict?

Mr. Wakefield: I don't know what the witness is going to say. He started to say, "Wahl said."

The Court: Well, you should know what your purpose is in asking this question.

Mr. Wakefield: My purpose is to show the general plan or arrangement which was made between these people for the reconditioning or the inspection of this.

(Testimony of James C. Gow.)

The Court: Read the question.

(Last question repeated by the reporter.)

The Court: I don't see how you could tell what was in his mind. The last part of the question "Agree"—as to that part of it the question may be propounded.

Mr. Wakefield: Perhaps I can—

The Court: Redraft the question.

Mr. Wakefield: May I change the question, your Honor?

The Court: You may. [382]

Q. (By Mr. Wakefield): Did you together with the assistance of Pete Wahl eventually recondition this shipment or segregate the good from the bad?

A. It was with Mr. Wahl that I came to the conclusion that there were a number of barrels that were in a badly damaged condition and there were others that were in a less damaged condition. Along with Mr. Wahl—who had had a lot of experience with herring—we discussed the condition of the herring. He was the one that took the herring out of the barrels for me and showed me.

The Court: With what result so far as reconditioning or salvaging or selling did you act on this herring?

The Witness: We didn't recondition the herring. It was put into cold storage and was later sold—that which could be sold. That which could not be sold was disposed of.

Q. (By Mr. Wakefield): That is, you mean that the barrels which were in your opinion in fit condi-

(Testimony of James C. Gow.)

tion or not, say, unfit for human consumption were placed in cold storage?

A. They were all placed in cold storage. That which had any value at all was placed in cold storage to be disposed [383] of later.

Q. Mr. Gow, did you take any temperatures of the contents of these barrels of herring?

A. No, sir.

Q. Did you know that temperatures had been taken?

A. I learned later that temperatures had been taken, yes, but not at the time I inspected it.

Q. At the time you made an inspection did you feel the barrels or put your hand in them?

A. Why, I had herring in my hands and also part of the brine when I picked up a herring.

Q. Was it hot? A. No, sir.

Q. These barrels that were opened for inspection on September 5th, how many such barrels approximately were opened?

A. Out of the shipment I would say those that we saw on the first day represented about two hundred barrels.

Q. There were that number of barrels opened?

A. Yes.

Q. Did you ascertain from what hold this herring had come on the Denali? A. Yes, sir.

Q. Did you go down into this hold? [384]

A. I went down into the hold the next day.

Q. What hold was it? A. Number 3.

Q. Did you make any inspection of number 3—this was the lower hold, was it?

(Testimony of James C. Gow.)

A. Yes; number 3 lower hold.

Mr. Hamlin: May we have that date fixed, please?

Q. (By Mr. Wakefield): You say this was the following day; that would be September 6th?

A. That is right.

Q. Did you make any inspection of number 3 lower hold at that time?

A. Yes, sir, we did.

Q. What was the purpose of making your inspection?

A. The purpose of the inspection was—seeing as the fish was in damaged condition and the statements were that the damage was alleged to be heat—I went aboard to see whether there were any conditions on the ship that I figured would be accountable for that heat.

Q. That is what you were looking for when you went into the hold? A. Yes, sir.

Q. What was the condition of the ship on September 6th, [385] when you went aboard?

A. The hold was empty. The hold was warm. I would say it was warmer than the outside temperature but not abnormally warm.

Q. What was the condition of the ship as to whether it was in a laid-up condition or in an operating condition?

A. The ship was in a laid-up condition. The strike was on. The ship was shut down.

Q. The ship was shut down at the time you were aboard? A. Yes, sir.

(Testimony of James C. Gow.)

Q. Did you have to use flashlights?

A. Used flashlights.

Q. Did you find anything, Mr. Gow, in number 3 lower hold that you could attribute to causing heat damage to barrels of herring?

A. No, I didn't. The bulkheads are not covered. The shaft alley bulkheads were not covered. They weren't warm or radiating heat at that time.

Q. Are there any steam pipes in the holds?

A. There are no steam pipes in the holds at all.

Q. What would you say, if you know, with respect to the forward end of number 3 lower hold—the forward bulkhead between the shaft alleys? Is that forward bulkhead the engine room bulkhead? [386]

A. No. The forward engine room bulkhead is about four feet forward of the shaft alley. There is a connecting passage way between the one shaft alley and the other. Beyond that is the engine room bulkhead.

Q. Mr. Gow, will you state your opinion as to whether or not number 3 lower hold on the Denali—assuming that it was in the condition you found it on September 6th, 1946, except that the vessel was operating rather than being shut up by the strike—whether that hold in your opinion is a proper hold for the carriage of salt herring from Alaska to Seattle on a voyage of ten or twelve days' duration in the summer time?

A. I would consider it a proper hold and I would pass it as such.

(Testimony of James C. Gow.)

Q. In your opinion, is either number 3 or number 4 hold on the Denali, as you found it on this occasion, a warm or a hot hold?

A. No, sir; I wouldn't call it a warm or a hot hold.

Q. Mr. Gow, what if you know is the effect of a lower hold, the fact that it is below the water line; what effect if any does that have upon the hold?

A. In lower hold stowage, the coldness of the water—the lower hold would be below the water; therefore [387] the cold water on the shell plating would have a cooling effect on the shell plating in the hold.

The Court: Does a cargo space below the water's level or elevation make a favorable stowage space for sweating cargo which sweats because it has heat?

The Witness: Lower hold stowage is all right, your Honor. Sweating of cargo, your Honor, is due to warm air striking a cold surface. Then you get condensation, like canned salmon. If the cans are cold when they are put in the ship and warm air strikes the cans, the warm air will condense. In the same way in a ship you get condensation from warm air striking the ship's cold plates. That is the reason you have to put sweat bands on to keep the cargo from coming actually in contact with the steel.

The Court: Many times you find cargo that has that sweating characteristic stowed in space below the water level, on touching the ship outside, do you not?

(Testimony of James C. Gow.)

The Witness: Yes, you do. You find it more in the case of the upper deck where you have an exposed weather deck and it gets cold and the sweat drops down on the cargo.

The Court: Wouldn't it be better to have that [388] sweating cargo stowed on some upper deck where you might ventilate it better from the outside air?

The Witness: You can ventilate the 'tween decks of the lower holds very well on a ship. But the sweating of cargo itself is something that causes a lot of damage because you have a large mass there, whereas sweat from the ship's side, you have battens and you have supplementary dunnage and you have matter in between the sweat battens which holds the cargo away from contact with metal surfaces, so you don't get as much damage to a commodity as you would from a drip overhead, above.

The Court: Just suppose for the sake of this question only, that this cargo of salt herring in barrels was actually warmer inside the barrels—in the midst of the contents of the barrels—when the cargo was placed on board in this hold space in number 3 and number 4 holds, than was the temperature in that space, and suppose that would have a tendency to continue some kind of a heat condition; suppose the warmth of the inside contents of air was such that the outside cooler air in the lower hold wouldn't have the effect of cooling it in time to avoid further deterioration, don't you

(Testimony of James C. Gow.)

think that space somewhere in the ship other than this would be available, where [389] the temperature and ventilation could have been more accurately controlled and applied, would have been better than putting this cargo where it was placed?

The Witness: I don't think so.

If the cargo was in good condition before it was shipped and cooled properly before it was shipped, I don't think that in a 10 or 12-day period that warm outside air or warm air in the hold could possibly affect the herring to damage it to the condition in which we found it when it came down here.

The Court: You may inquire.

Mr. Wakefield: I was going to ask the question of the witness that he just answered in explanation to your Honor's question.

Q. (By Mr. Wakefield): In that respect, Mr. Gow, the answer that you made immediately preceding, did you take into consideration the condition of the herring as you saw it at the time it was discharged here in Seattle? A. Yes.

Q. I understand it is your opinion that if this herring had been in proper condition and sufficiently cooled when loaded at Port Wakefield that the condition you [390] observed on September 5th could not have been produced during that 12-day voyage in the hold of the vessel, is that correct?

A. Yes, sir.

Q. What then, in your opinion, did cause the condition of the herring which you saw on September 5, 1946?

(Testimony of James C. Gow.)

Mr. Hamlin: That is objected to upon the ground that the witness is not properly qualified to draw a conclusion of that kind and can do no more than speculate.

The Court: You haven't asked any other expert that question, have you, Mr. Wakefield?

Mr. Wakefield: I believe not.

Mr. Hamlin: I asked that question and objection was sustained to it when Mr. Perry was on the stand.

The Court: It seems to me that a same or similar ruling should be made here. Whether or not Counsel is accurate in his recollection of what happened in the case of the witness Perry, that the Court ought to sustain this objection.

Mr. Wakefield: I would like to ask a similar question and see if that would not clear this up.

Q. (By Mr. Wakefield): Mr. Gow, in lieu of my last question, can you tell us from your own knowledge of [391] herring and its qualities and propensities what other possible causes there could have been which would have caused the condition you found in the herring on September 5th, 1946?

A. Well, the only other causes that I would know of or consider could happen would be that the fish had been caught and left too long before being packed and therefore had started to spoil before they were packed, or that they were improperly brined or cured in the curing process.

Q. Do you believe that assuming that four hundred barrels of the herring had been out in the

(Testimony of James C. Gow.)

open on the face of the dock at the saltery in the sunshine for five or six days would have any effect on it?

A. I believe it would have a very decided effect on it. Out in the sun the barrels become warm. If when herring is packed and cured it is cooled off and kept cool, and when it arrives down here in the ship, it is immediately taken out of the ship and put in a warehouse in refrigeration space or if it is going out by cars it is put in iced cars. Therefore, it is quite evident that the herring has to be protected to maintain its quality.

If it is left on an open dock prior to its shipment or left on an open dock after it has been discharged, [392] I think you would find that time and heat would cause it to be damaged.

Q. With respect to the items of damage, Mr. Gow, is it a fact that you did not approve without prejudice the various items of charges for the storage of the herring after it had been segregated?

A. Yes. I approved known charges to me which I felt were applicable to the damage but no charges which I felt would have been incurred irrespective of the damage.

Q. Could you tell us the items and the amounts thereof that you did approve without prejudice?

A. If I look at my report I can. The items I approved were "Wahl Brothers, Inspection and Segregation, in the amount of \$99."

Another bill of Wahl Brothers of inspection and segregation of \$54.

(Testimony of James C. Gow.)

Removing of the herring from cold storage to the warehouse for inspection and segregation, \$157.86. Return to cold storage, \$250.54. Labor and equipment for inspection, \$23.90, making a total of \$585.30.

Mr. Wakefield: What is the total of those items, Mr. Gow?

The Witness: \$585.30. [393]

Q. Now with respect to the balance of the items which I believe come to slightly in excess of \$1700, why did you not approve the balance of those items?

A. Well, on those items as I state in my report, "The storage charges on this report are not listed as an expense item as such items are only applicable as they are over and above the normal storage." So they had wharfage and storage charges incoming on which they normally would have had to pay and storage charges they normally would have had to pay. If a shipment was moving out immediately, why, it would naturally be affected one way or the other. If they were coming in and going to stay and then be stored for any length of time, why, there would have been normal storage on it, anyway.

Mr. Wakefield: I think that is all.

The Court: You may cross-examine.

Cross Examination

By Mr. Hamlin:

Q. Mr. Gow, have you ever sailed?

A. Yes.

(Testimony of James C. Gow.)

Q. When did you sail? [394]

A. I sailed in 1912, in 1914, and also prior to that in 1908. I was not a Master.

Q. In what capacity did you sail?

A. I sailed on deck—as a deck-hand.

Q. As a deck-hand? A. That is all.

Q. On each of those occasions?

A. Yes. On the first occasion I sailed with my father merely as a messboy.

Q. Was it just one trip on each of those years?

A. Just one trip.

Q. One trip each year? A. Yes.

Q. Have you ever followed an occupation which required you to use your discretion in the stowage of cargo—in the actual placing of cargo in a ship, that is what I mean?

A. Yes. I served an apprenticeship in the Gow corporation for five years.

Q. In that apprenticeship did you direct the loading of ships and decide where cargo should be placed?

A. Not in the five years of apprenticeship. I was with seniors who knew the stowage of cargo and I served my apprenticeship with them. The decisions were theirs until I served my apprenticeship. [395]

Q. That was your father, was it?

A. That is right.

Q. After this 5-year apprenticeship, was there any period at all when you actually had the decision of saying where cargo should be put in a ship?

(Testimony of James C. Gow.)

A. Yes.

Q. When?

A. Oh, after—that was '22—that would be 1927.

A number of our clients would ask a question of the firm as to whether it was good stowage to place cargo here or place cargo there, and what commodities could be put together.

Q. Have you ever had to make any such decisions about salted herring in barrels?

A. Yes. I have made decision on mild-cured salmon and herring, but that has been in the off-shore trade where it was put into refrigerator space.

Q. I see. It wasn't ordinary storage, then?

A. No.

Q. They just carry it in refrigerators in the off-shore trade? A. That is right.

Q. Why is that?

A. Because a mild-cured product of that type is not considered for a voyage of any duration as safe to [396] carry it; it will spoil.

Q. You are speaking, I take it, of voyages perhaps to the Orient?

A. Oh, voyages to Europe—they carry mild-cured salmon to Europe.

Q. You have told us about refrigerated cargoes, but have you ever been charged with direct responsibility for placing salted herring or mild salted herring or mild-cured salmon aboard a vessel without refrigeration? A. No.

Q. At whose request did you undertake to sur-

(Testimony of James C. Gow.)

vey this cargo of 1358 barrels of herring?

A. Alaska Steamship Company.

Q. Were you furnished with a report before you undertook your survey? A. Yes, sir.

Q. Were you advised that there had been a heat damage claim by the consignee?

A. No. I was advised that herring had come out of the number 3 hold or had been discharged and was said to be damaged and I went down and made the survey to find out the cause.

Q. When did you first learn that the claim was founded on excessive heat? [397]

A. September—excessive heat?

Q. Yes.

A. I don't think anybody told me it was excessive heat at all. I was called in on the 5th to go down to the ship. I went down with Mr. McClelland to find out what was the trouble. The herring was reported damaged, but at that time it hadn't been stated that it was excessive heat.

Q. Were you not furnished with the OS&D report which has been placed in evidence here as Respondent's Exhibit A-7 at that time? That is the receipt signed by Mr. Sharp, which indicates that the dock was claiming damages by heat.

A. No, I wasn't.

Q. Can you recall at all when the subject of heat first came up in your inspection of this cargo?

A. Yes. The heat came up when I was inspecting the herring with Mr. Wahl. Mr. Wahl made

(Testimony of James C. Gow.)

the declaration that the herring was damaged by heat.

Q. That was on the morning of September 5th, about 10:00 o'clock, was it not?

A. About then, yes.

Q. At that time the cargo had been on the dock how long?

A. It had been discharged on the 4th and it was out on [398] the 5th from the number 3.

Q. I believe the testimony so far has been that the discharge was finished close to midnight; is that your understanding of it?

A. That is right.

Q. So it had been on the dock about 10 hours?

A. Yes.

Q. You took no temperature readings of that herring?

A. No, sir.

Q. Did you take any temperature readings of either number 3 or number 4 lower hold?

A. No, sir.

Q. How does it happen that you took no temperature reading when you knew there was a claim that this merchandise had been damaged by heat?

A. For the reason that I didn't consider that the temperature in the holds, when I was in there, was any more than slightly warmer than the outside temperature. I just couldn't conceive that any heat like that would have any effect on the cargo.

Q. Wouldn't it have been, in your opinion, good surveying practice to check those accurately in a claim for damage by heat?

(Testimony of James C. Gow.)

A. It didn't occur to me at that time as being necessary.

Q. Did you make a written report covering your survey of [399] this cargo? A. Yes, sir.

Q. Do you have a copy of it with you?

A. Yes.

Mr. Hamlin: I will ask that it be marked, if the Court please.

The Court: Let it be marked with an appropriate exhibit number.

(Survey Report marked as Libelant's Exhibit 16 for identification.)

Q. (By Mr. Hamlin): Showing you what has been marked Libelant's Exhibit 16 for identification, I will ask you to tell us what it is, please.

A. Survey Report covering the shipment of herring on the Denali, Voyage 55, and stating the conditions and expressing an opinion as to the damage and the cause of the damage.

The Court: By whom was that report made?

The Witness: It was made by myself.

Q. (By Mr. Hamlin): Was it signed by you also?

A. Yes, sir—the corporation and myself.

Mr. Hamlin: I asked that this report be submitted in evidence. It is offered. [400]

The Court: At this time Libelant's Exhibit 16 is received in evidence.

(Libelant's Exhibit 16 received in evidence.)

The Court: Court will be in recess for about five minutes.

(Recess.)

(Testimony of James C. Gow.)

The Court: You may proceed.

Q. (By Mr. Hamlin): Mr. Gow, calling your attention to page 3 of your report which is Libellant's Exhibit 16, reading from the very top of it, "Survey was made subsequent to the discharge of the vessel and as damage is alleged to be due to spoilage as a result of heat a special survey of this space was made when the vessel had steam on her boilers, therefore, see Special Survey Report covering conditions in this compartment."

Do you have that special survey report covering conditions in this compartment?

A. No, I do not.

Q. Where is that report? [401]

A. That was made by our office at a later date than the time when the ship came in. It was made at a date after the ship had been under steam.

Q. You didn't make that observation, yourself?

A. No, sir.

Q. Did you base this report upon that additional document, however? A. No, sir.

Q. I notice farther on down on page 3 you have a table showing the sale and expense—well, the sale of the damaged herring and I read as follows, under the heading "Quantity of barrels. 110 quarter barrels declared sound, market value, \$13.00," and so on across, showing that \$32 was realized net.

"119 half barrels large, \$23 declared sound market value," and reading on across "Sold for \$168.00."

(Testimony of James C. Gow.)

“1129 half barrels medium, declared sound market value, \$21.00; sold for \$1,575.00, a total of 9,387—1129.”

Then there is the figure 79, referring apparently to half barrels of medium, sold for \$8.00, a total sale of six hundred thirty-two for those—making a gross amount received on the sale of \$10,329.00.

Now I ask you: Where did you obtain your information for the declared sound market values of \$13 for quarter barrels medium \$23 for half barrels large and \$21 for half barrels medium?

A. I inquired at the time of making the survey, purely with the purpose of determining what would be the dollars and cents value represented in the loss. I don't know whether I got it from Captain Perry or I got it from Mr. Wahl or anybody—what the price of herring was bringing in a sound condition at that time.

As far as going out—and then I checked those values with the Eardley Fish Company to find out what values were the prevailing values at the time. As far as my determining the value of the damaged cargo, that wasn't necessary in my case, because when the claim is filed with the steamship company, substantiating documents for those values would be furnished.

Q. But you did ascertain that those values of \$13 for quarter barrels medium \$23 for half barrels large, and \$21 for half barrels medium were the fair market values?

A. They were the generally prevailing prices that the herring would bring generally. One buyer

(Testimony of James C. Gow.)

might pay [403] more or less for the herring but that was the general values within the range that I determined.

Q. Was that the value at "X" dock?

A. Yes.

Q. Just how extensive was your examination of number 3 and number 4 lower holds as to conditions which might possibly cause heating?

A. I examined them, went into the compartments, and examined them thoroughly to see if there were any pipes or any conditions in those holds that would cause heat. I found no condition of heat other than that which you would expect to find in a ship when she was shut down, which would be higher than in a ship when she was opened up.

Q. Where did that heat come from that was generated when it was shut down?

A. The outside heat and the heat of a hold. When you close a place up, it will retain its warmth more than the steel of a ship's side or ship's decks. The inside of a room—like this room if you shut it up—it would be warmer in temperature than it would be with air circulating through it.

Q. Would you say that the walls of the compartment imparted their heat to the atmosphere within it and heated it up? [404]

A. No. The bulkheads weren't particularly warm. If there was any warmth in them at all from the shaft alleys as a result of closing down all of the ventilation, and she warmed up a little,

(Testimony of James C. Gow.)

that would have the effect of warming up the hold slightly on a shut-down ship.

Q. You mentioned that it was warmer than the outside air. I just wondered if you had found what causes it to be warmer.

A. Well, without any ventilation into the space it would be bound to be warmer.

Q. Of course, heat has to come from some source, doesn't it?

A. Yes. But generally a ship that previously had been alive and later on is buttoned up—whatever heat was in there would be retained. It was warmer than the outside temperature but not exceedingly warm.

Q. I think you mentioned the fact that this hold was below the water would cause it to be cooler, didn't you?

A. It would cool the plates but the question of whether there was sufficient coldness of those plates from the outside water temperature — it might not affect the hold too greatly. [405]

Q. Didn't you state that the fact that this hold in lower number 3 was below the water line in your opinion made it a cooler hold?

A. Oh, I think all holds that are below the water level would be cooler than a 'tween deck that is exposed to the rays of the sun. If a ship is painted black, for instance, you will get a radiation of heat from the shell plating and you will get a higher temperature than you will down below.

Q. Did you go into hold number 3?

(Testimony of James C. Gow.)

A. Yes.

Q. And that is the space you said was a little warmer than the outside air? A. Yes, sir.

Q. Did you enter the shaft alleys?

A. Yes, sir.

Q. How many steam pipes did you find in the shaft alleys?

A. One exhaust and two steam pipes. I believe if I recall right there was one that was five inches and the other was four inches.

Q. It is a little hard for me to hear you.

A. There are two steam pipes, one on the port and one on the starboard, that extend along the shaft alleys but those pipes are lagged. They are not exposed.

Q. They are not insulated at the joints, are they? [406] A. No.

Q. Did you find just one pipe? A. Yes.

Q. Isn't there a return to the pipe?

A. There is a 5-inch intake and a 4-inch outlet—return.

Q. The steam goes in through a 5-inch and comes back through a smaller return pipe?

A. As I recall it, yes.

Q. Do you know what apparatus that steam pipe fed?

A. No, because that was down at the time and I examined or felt the bulkheads. I don't know whether that goes back to the steering engine or just where it does go.

Q. As I understand you, there were two in each

(Testimony of James C. Gow.)

alleyway? A. As I recall it, yes.

Q. One for steam and one for the returning of condensed water. Does the water return in an insulated pipe, too?

A. Both pipes, as I recall, were insulated.

Q. When you made up this report were you under the assumption that there were just two pipes in each alleyway?

A. Yes. My report was based on the condition I found in the hold. It wasn't particularly an examination [407] of the alleyway but I knew those pipes were lagged and that being lagged they wouldn't radiate sufficient heat and then transmit it to the shaft alley to radiate heat into the hold.

Q. Do you recall where those pipes were located in the shaft alley?

A. Yes. They were in the shaft alley just underneath the round of the shaft alley over on the outside—well, they wouldn't be on the outside. They would be just about at the top of the round of the shaft alley.

Q. They were at the top of the round?

A. Yes, just below the surface of the shaft alley.

Q. How high is that shaft alley?

A. From the floor that you stand on I would say seven feet—seven and a half feet.

Q. Did you feel these pipes at the time you were down there to see if they did radiate heat—the steam pipes? A. Yes, sir.

Q. Did you feel them at the joints?

(Testimony of James C. Gow.)

A. Yes, sir.

Q. You were down there at what time of day?

A. I was down there on the morning of the 6th.

Q. The ship was dead then, was it not? [408]

A. That is right; they were dead.

Q. Did you find any other steam pipes down in lower number 3 except those in the shaft alleys?

A. No, sir.

Q. Did you pass through the passageway between the shaft alleys just ahead of the forward bulkhead of number 3?

A. Yes, sir.

Q. What is directly ahead of that passageway?

A. That would be the engine room bulkhead.

Q. Was any heat generated by that passageway?

A. I wouldn't say so, no. What heat there was would be carried away from the shaft alley by the escape hatch which is at the forward end of that compartment.

Q. Is the escape hatch kept open while the ship is sailing?

A. The escape hatch leads into the 'tween deck locker and then it also goes up to a ventilator. It is my understanding that that is left open at all times.

Q. I note on page 4 of your report that you mention "No efforts had been made to cover these barrels or to keep them cool by wetting them down with cold water although it is generally known that this commodity is subject to

(Testimony of James C. Gow.)

rapid deterioration if exposed to the sun for even a short period of time." [409]

Upon what did you base the statement that nothing had been done to cover the barrels or keep them cool?

A. That statement is based on statements made by officers on the ship that were there at the times of loading.

Q. You didn't talk to anybody that was at the plant for the last few days before the ship was loaded, did you? A. Did I what?

Q. Did you discuss the question of whether or not these barrels were wet down with anybody that was at the dock there at Port Wakefield for the last few days before?

A. No. I discussed with Mr. McClelland the question of what statements he had been able to receive from the Master or the mates or anybody aboard the ship regarding conditions at the point of loading. I wasn't there, therefore, I wouldn't be in a position to know. But if the Master or mate makes a statement then we surveyors use that statement as a means of a fact that has been determined at the point of loading.

Q. On page 7 of your report in the second paragraph, referring now to Libelant's Exhibit 16 again— [410] A. Which paragraph?

Q. The second paragraph. It is the first one which begins on that page, "From our examination of the herring on discharge and on investigation made it is our opinion that the compartments

(Testimony of James C. Gow.)

wherein these shipments of herring were stowed were suitable spaces for the carriage of this commodity if the commodity was in sound condition when shipped." I ask you, Mr. Gow, would your conclusion in that respect have been different if in making this report you had considered that there were other steam pipes in the alleyways with a total of approximately 9 to 10 inches of steam pipe space?

A. It wouldn't have affected my reasoning or my approval. Had I been asked to pass that compartment, I would have judged it not on the pipes that were in the alleyway. I would have judged it on what were the conditions of the hold itself or what heat you might get there and the conditions. I think number 3 hold would have been suitable space to stow cargo.

Q. Assuming that these pipes were on the side of the alleyway adjacent to cargo which was to be stowed between the alleyways, would that have changed your opinion any? A. No, sir. [411]

Q. You would have ignored, then, in your disposition of this matter, the presence of steam pipes behind a— A. Steam pipes are—

Q. —behind a steel covering of the alleyways right adjacent to the cargo, is that correct?

A. Yes. The steam pipes in that case are lagged and covered with an insulation and any heat that would would get coming from that steam pipe, with the air circulation that you would have through the alleyway through the shaft alleys, I think it

(Testimony of James C. Gow.)

would be very remote in my opinion that you would get any heat in that which would in turn transmit sufficient heat to damage a commodity of this kind.

Q. When you say "lagged", you mean insulated, don't you?

A. I mean it is covered with insulation, yes.

Q. In making that statement, you are considering that the joints of these steam pipes are not insulated, are you not?

A. That is right.

Q. You mentioned circulation. Did you mean in lower number 3 or in the shaft alleys themselves?

A. In the shaft alleys themselves.

Q. Are you taking into consideration any conditions of circulation within number 3 lower hold itself? [412]

A. No; not in connection with this commodity.

Q. Would over-stowing of the cargo of salt herring with cartons of salmon in your opinion affect the desirability or propriety of stowing salt herring between two shaft alleys?

A. No.

Q. Do you not feel that that would have any effect upon the herring in so far as—

A. No, I don't think in the case of salt herring packed in brine and stowed in that space, I don't think you are relying upon circulation of cold air between that commodity as you would with fish meal or other commodities that are known definitely to require the circulation of air.

Q. I have read before your statement that exposure to the sun for a very short period will

(Testimony of James C. Gow.)

cause rapid deterioration. That is what you said, wasn't it?

A. Yes. I would like—if I am permitted to mention the name of the gentleman who is deceased—I would like to bring out here that it was very forcibly pointed out to me by Mr. Wahl that if any barrels of herring were left out on the face of the dock for a short time in the heat of the sun, they would deteriorate. He certainly had a vast knowledge of herring. He was an expert as far as being able to [413] determine whether they were good or bad.

Q. He didn't tell you whether he meant with the head on or off, did he?

A. He said definitely that if they were stored out there with the heads on they would be that way.

Q. He was talking about Seattle, was he?

A. Yes.

Q. Have you ever had any experience with exposing herring to the sun in Alaska?

A. No, I never have had any experience with it. But I do know that Alaska weather is in many cases very comparable with Seattle.

Q. Have you ever been up there?

A. Yes, sir.

Q. To Port Wakefield? A. No, sir.

Q. Where have you been in Alaska?

A. Seward, Anchorage, Juneau, Cordova.

Q. Was it your observation that the sun shines at a greater or a less angle than it does down here in Seattle in August?

(Testimony of James C. Gow.)

A. Well, I don't know. I wouldn't be able to express an opinion on that. But I would say that the sun striking a barrel of herring would have a tendency to heat the barrel and it is not considered a good [414] practice; otherwise, they would store barrels of herring when they come down from Alaska—if they had them to store—they would put them out on the face of the dock when they are as crowded as they are.

Q. If you had known that the barrels of herring involved in this action had been covered with salt sacks and tarpaulins and wet down frequently every day that they were on the dock and were just uncovered a short time before the Denali arrived, would that have changed the conclusion which you have expressed in Exhibit 16?

A. It wouldn't have changed my opinion for the simple reason that I still don't think it is possible to pack herring in a brine, when the herring is in perfect condition, well cooled, and put them into a vessel with the same stowage as this had and bring it down to Seattle, that you can get sufficient warmth in that period of time to damage the herring. I don't think you can bring the brine up to a temperature that will cause the damage in that period of time.

Q. I notice on page 7 of your report, being Exhibit 16, you state in the fourth paragraph "Further, as it is general information that spoilage will take place rapidly if the barrels are left in the sun or in a [415] warm warehouse, it is our

(Testimony of James C. Gow.)

opinion that this shipment was not properly cared for by the shipper prior to shipment."

If you had known that this shipment was wet down and covered with salt racks and tarps, would you still have come to that conclusion?

A. I would still have thought that the herring would have arrived in a sound condition.

Q. That isn't my question. I mean, would you have come to this conclusion that you have expressed here, to wit: "It is our opinion that this shipment was not properly cared for by the shipper prior to shipment."

The Court: How much longer do you expect the cross examination to take reasonably from inquiring counsel's point of view?

Mr. Hamlin: I would think, your Honor, ten or fifteen minutes.

The Court: This case will be continued for further trial until tomorrow morning at 10:00 o'clock Court is adjourned until that time.

(At 5:00 o'clock, p.m., Thursday, July 15, 1948, Court proceedings adjourned until 10:00 a.m., July 16, 1948, in the United States Court House.) [416]

Seattle, Washington

July 16th, 1948, 10:00 o'clock, a.m.

(All parties present as before.)

The Court: You may resume the taking of testimony in the case on trial. I believe Mr. Gow was on the stand and he may resume the stand for further examination at this time.

JAMES C. GOW

(Resumed)

Cross Examination—(Continuing)

By Mr. Hamlin:

Q. Mr. Gow, I believe at the close of yesterday's session you had stated in effect that even had you known that these barrels of salted herring were piled under cover of tarpaulin and salt sacks and wet down, that that would not in any way have affected the conclusion indicated in your report that stowage in the sun by the shipper was the possible cause of this loss; was that, in effect, [417] what you said?

A. No. In my statement—if the herring had been properly cooled down and been kept in a cool place under its original treatment I think the herring would have been in good condition. But I don't think any condition in the ship would have given the condition on out-turn that we found.

Q. Well, I notice on page 8 you say, "There are a number of conditions which could cause the conditions found—fish being held too long before packing due to congestion at the cannery, improper curing and preparation and the barrels being subjected to warm conditions." And you also say on page 7, "The wetting down of the Port Vita shipment clearly indicates the necessity of keeping this class of merchandise cool as the Port Vita shipment which was properly protected from exposure to the sun outturned undamaged and the Port Wakefield shipment which was not properly protected

(Testimony of James C. Gow.)

from exposure prior to shipment in the vessel out-turned damaged."

I just wondered if you had known that if these barrels were covered with tarps and salt sacks wet down whether you think this damage would have been attributed to piling them on the dock?

A. I don't think there would have been any damage because [418] if the herring was cold originally and was in good condition when it was put in the ship, I don't think there was any condition in the ship which could have contributed to or caused the damage.

Q. Then you assume that this herring had been piled out there without cover?

A. If it had been covered and all cooled down before it was put in the ship, I don't think we would have had any damage.

Q. That isn't my question. I say in preparing this report you were under the impression that it had been piled on the dock without being covered or wet down, hadn't you?

A. Yes; in my investigation that some of the herring had been on the dock without cover.

Q. So far as you were able to ascertain, that is what you thought had happened?

A. Yes, sir.

The Court: What was your source of information on that; was it from Mr. Wakefield?

The Witness: No, sir. It came from the records of the Alaska Steamship Company.

The Court: It came from the records of the Alaska Steamship Company.

(Testimony of James C. Gow.)

The Witness: Yes, sir. [419]

The Court: Did you consider any information on that point furnished by the libelant Apex Fish Company?

The Witness: No, sir.

Q. (By Mr. Hamlin): Then in preparing this report you had the understanding that it was so piled so what I am trying to get at is that if you instead had the understanding that it was wet down and under cover of tarps and salt sacks, would you have come to a different conclusion in your report?

A. When the herring was out-turned damaged, I would have still considered there was some other cause than any cause found in the ship because I would still have thought there was contributing causes.

Q. Would you have still thought that if the herring had been covered and wet down?

A. If the herring had been out-turned damaged, yes.

Q. You still feel that would be one of the causes. Did you consider, at the time you made the report, the direction of the compass that the Port Wakefield dock faces? A. No, sir.

Q. Did you know whether or not the barrels of salt herring were piled up against the walls of the warehouse or [420] out in the open away from any building?

A. I understood that some were outside on the open dock; and some were just in the entrance to the warehouse.

(Testimony of James C. Gow.)

Q. I say, as to those which were on the open dock, did you know whether they were against the wall or away out on the face?

A. I wasn't told that they were against the wall. I knew that the reports were that they were on the outside of the dock and exposed to the sun.

Q. You weren't informed, though, as to whether they were up against anything that might cast a shadow? A. No, sir.

Q. Did you know there was a warehouse building out on that dock?

A. I understood there was, yes.

Q. Did you know how high it was at the time these barrels were out there?

A. I don't know the height of it.

Q. Did you at the time you prepared this report? A. No, sir.

Q. Did you know how many barrels were piled on the dock at Port Wakefield?

A. I understood from the records it was approximately four hundred.

Q. Did you know whether they were tiered up or standing [421] singly without any being on top of one another? A. No, sir.

Q. If you had known at the time of making this report that the libelant's dock and the warehouse situated thereon faced approximately northeast that the barrels of salt herring concerned were piled in tiers of three or four or more high directly against the wall of the warehouse on the libelant's dock, that such warehouse building was ten to

(Testimony of James C. Gow.)

twelve feet high and that not more than 400 of the barrels were so piled on the dock, would you have then come to the same conclusion stated on pages 7 and 8 of your report?

A. If the herring was stored in a warehouse or stored in open space where the rays of the sun could get at the herring or that there was no cooling, I would still feel that that was a contributory cause of damage.

Q. No. I want you to just assume the facts that I recited in my question; don't assume other facts, please—just those that we have stated.

If you had that information which I outlined, would you still have felt that the causes of damage were those you have listed on pages 7 and 8, namely, improper storing, subjection to warm conditions, and putting them in the sun? [422]

A. Yes.

Q. You still would. Then how do you account for the 958 barrels that were in the warehouse being damaged, too?

A. I don't know when the herring was packed; I don't know what the condition on the inside of the warehouse was. It may have been a corrugated steel warehouse to reflect the sun. It might have been warm inside the warehouse. I wasn't there and didn't know those conditions. I did know some of it was outside from statements made in my investigation. However, from the statements of herring experts, where herring is stored in a warehouse and there are warm temperatures, in due time it will damage the herring.

(Testimony of James C. Gow.)

Q. At the time did you inform yourself of the amount of sunshine enjoyed by the Port Wakefield area during the period that the herring was being packed which, according to the testimony, was from July 24th to August 6th?

A. No, sir.

Q. Did you know at the time of making your report that the conditions as to sunshine during the month of July as indicated by the United States Weather Bureau showed that July, 1946 had only one clear day, twelve partly cloudy days, and eighteen wholly cloudy [423] days, while the month of August, 1946 had no clear days, eleven partly cloudy and twenty entirely cloudy, would that have changed your conclusion in any way?

A. No; because I believe that herring is packed and shipped down to Seattle and the minute it comes into Seattle it is put into cold storage for the reason they want to preserve the herring. I think herring stored after it arrives here or prior to its shipment that is left out for any period of time where warm weather or warmth could affect the herring—I think over a period of time it would damage the herring regardless of whether it was in the direct rays of the sun or not.

Q. What degree of heat is necessary to start spoilage in a barrel of herring?

A. That is something that I couldn't say without running a test on it.

Q. Did you know what the maximum temperature recorded in Port Wakefield, Alaska or that

(Testimony of James C. Gow.)

area was during the period indicated when you made up your report? A. No, sir.

Q. If you had known that the maximum temperature reported for the month of August, 1946, was 66 degrees, on the 23rd of August, would that have changed your findings [424] in any way?

A. No, sir.

Mr. Wakefield: Did you say 23rd, Counsel?

Mr. Hamlin: Yes.

Q. (By Mr. Hamlin): I meant in that question to convey to you the thought that that was the highest temperature recorded in the month of August. Did you have that in mind when you answered the question?

A. My answer would still be no.

Q. Were you aware of how herring was processed at the time you made this report?

A. Yes. I had knowledge of how it was processed.

Q. Are you familiar with the repacking feature in the putting up of salt herring of this type?

A. I had seen it done, yes.

Q. Did you have in mind, when you made your report, that a great many of these barrels were opened, inspected and repacked within the last few days of the time that the Denali arrived there on August 23rd? A. No, sir.

Q. You had forgotten about that when you made your report?

A. In that question, do you mean Port Wakefield?

(Testimony of James C. Gow.)

Q. Yes, sir.

Mr. Wakefield: That is an improper question. [425] I object to it as improper cross-examination. I don't recall any such evidence as that, your Honor. Besides, this is not proper cross-examination.

The Court: The libelant may contend that there was such testimony or that there may be such testimony before the case is brought to a close.

The objection is overruled.

(Last question repeated by the reporter.)

Mr. Wakefield: It is not shown that he knew about it or that anyone did.

The Court: Objection overruled.

A. No, I wasn't at Port Wakefield so I don't know.

Mr. Hamlin: I don't feel that that is an answer to the question.

The Court: Read the question and answer, Mr. Reporter.

(Last question and answer repeated by the reporter as follows:

“Question: You had forgotten about that when you made your report?

“Answer: In that question do you mean at Port Wakefield?

“Question: Yes, sir. [426]

“Answer: No, I wasn't at Port Wakefield, so I don't know.”)

The Court: The objection is overruled. Ask the witness another question.

(Testimony of James C. Gow.)

Q. (By Mr. Hamlin): On pages 5 and 6 of your report you make some reference to a number of prior voyages of the Denali and then again at page 7 you draw certain conclusions from those voyages in the third paragraph. The fact that herring had been carried on previous voyages and that the shipments had been out-turned in good condition and further that as highly perishable cargoes have been carried in these compartments for a longer period of transit, without sustaining damage, in our opinion, precludes stowage or handling on the part of the carrier, being the cause or contributing cause of this damage.

I ask you, therefore, if in coming to such conclusion, you also made investigation as to the prevailing outside temperatures during each of the voyages which you have listed—that is, the outside atmosphere? A. No, sir.

Mr. Wakefield: If the Court please, I would [427] like at this time to object to the last question and to the cross-examination generally. Counsel for Libelant has had admitted in evidence this Survey Report. The Respondent didn't put it in evidence. I submit it is his own evidence, and he has made the witness his own witness, and now he is impeaching evidence, which he himself put into the record. I think it is highly improper.

The Court: Objection is overruled.

Q. (By Mr. Hamlin): Did you make any investigation about the condition of the ventilating system on these other voyages? A. No, sir.

(Testimony of James C. Gow.)

Q. Did you make any investigation as to the presence or absence of other cargo in the holds on these voyages which might generate heat, or perhaps cause cold? A. No, sir.

Q. Or, an investigation as to the number of stops the vessel made, and the number of times the hatches were opened or closed during the voyage?

A. No. That wasn't necessary from my point of view. I investigated to find out whether or not the vessel had carried similar cargoes, or other cargoes which would perish if subjected to heat or improperly cared for, and my investigation disclosed that these cargoes had [428] been carried, and they had out-turned in a sound condition; therefore, there was no reason for me to go in and check back and find out if there was ventilation, when there was no damage.

Q. Do you happen to know the relative melting points of the fatty types of cargo which you have listed in your report, and the melting point of herring, oil—herring fat?

A. No, I wouldn't say that I knew it exactly, no sir.

Q. I notice also that you have referred to a tank top on the floor of the number 3 hold. There is a tank under number 3 lower hold, is there?

A. There is a tank—a double-bottomed tank.

Q. In number 4 hold, also?

A. Yes, also in number 4.

Q. How far does that go?

(Testimony of James C. Gow.)

A. The steel tank top has a ground over it of three inches, and the floor itself is 3x12, so you need a six inch space between the steel tank top and the wood ceiling, or wood floor.

Q. How deep is the tank?

A. The tank itself?

Q. Yes, sir.

A. I don't know the depth of the tank.

Q. Does it go down to the keel? [429]

A. It is a double-bottomed tank; yes, it would go down to the keel.

The Court: What is that tank used for?

The Witness: That is fuel oil, sir.

The Court: Fuel oil used in the development of power for the propulsion of that ship, is that right?

The Witness: Yes, sir.

Q. (By Mr. Hamlin): I would like to ask you, Mr. Gow, if you are aware of the Port of Seattle bills for storage? If you have a record before you—I want to run through the Port of Seattle bills.

A. I haven't my record with me.

The Court: You may use the one in evidence.

(The exhibit referred to handed to the witness.)

Q. (By Mr. Hamlin): Mr. Clerk, I wonder if you could furnish the witness with Exhibit 15, page four?

A. (Witness looking at a different document.)

Q. (By Mr. Hamlin): The top bill on Exhibit 15, which the Bailiff has just handed you is, I believe, Bill No. 97,647, extra wharfage and handling in cold storage, Port of Seattle.

(Testimony of James C. Gow.)

Is that right? A. I have the bill. [430]

Q. That bill has a figure of two hundred and some dollars doesn't it? A. \$256.12.

Q. Were you aware that that expense had been incurred?

A. Yes, when this herring came in, it would have a wharfage charge. And the labor furnished for handling and discharging through cold storage, dock alleyway is a movement of shipment on its arrival.

Q. Did you notice down in the lower left-hand corner of that bill, Exhibit 15, a computation subtracting certain amounts from the gross amount?

A. Yes. It shows Normal Wharfage Charge \$40.05, Handling at sixty cents, plus thirty per cent, \$62.48, making \$102.53.

Q. What is your reason for excluding the balance of that from allowance in this matter?

A. I dealt in my report, purely with the charges that I felt were applicable to the damage. There might be other charges that would apply thereto, but that would be something that would come under the Claim Department of the Alaska Steamship Company, as to whether it applied by reason of the damage, or whether it was a charge that didn't apply.

Q. Mr. Gow, I would ask you to assume that this cargo had been sold and accepted by the buyer, and was destined [431] to roll right over the dock into cars, and move out of Seattle. Assuming just

(Testimony of James C. Gow.)

that fact, would you please just leaf through those bills, and tell me if you still feel they should be disallowed?

A. There is an overtime charge here on the bill, No. 97648. I couldn't say now whether or not that overcharge was something by reason of the damage or not. In my report, I state the things that I know—the removing of the herring from the cold storage to warehouse, inspection, and segregation; that is something I know was caused by reason of the damage. These two items would have been in excess of normal handling charges.

These other charges, while I know that they are no doubt the charges, and apply to the herring, they are not anything that would really come under my jurisdiction to say whether or not they are a legitimate charge or not, other than if it is applicable to the damage and is submitted to me again, then it would be up to me to approve or disapprove of it.

Q. Do you remember whether or not you and Captain Perry consulted with reference to these bills before they were incurred?

A. Yes, we did.

Q. You think they really ought to have been incurred, [432] is that right?

A. I took out of the bills those items that I actually knew that I would consider applied to the damage. There may be others in there that do apply, but I would be assuming that.

Mr. Hamlin: That is all.

(Testimony of James C. Gow.)

The Court: Is there any further examination of the witness, on redirect?

Mr. Wakefield: Yes, your Honor.

Redirect Examination

By Mr. Wakefield:

Q. Mr. Gow, in connection with the mild cured herring, are you acquainted with the principal market for that product—where it is sold, I mean, principally?

A. As I understand, the herring is sold principally in the east. The buyers come out from the east, and inspect the herring and purchase it. It isn't necessary for all buyers, I guess, to come out. They sell it, probably, on wire or phone sales, but in a lot of instances, the buyers come out and inspect it.

Q. Does that market, if you know, have any effect on whether or not the herring is a mild cure or not?

A. I do know this—that there are buyers who buy [433] herring who prefer to have it a mild cure rather than a strong cure, because it is more easily freshened, and the lighter the cure, or the less salt, the easier the freshening of it, and if they could get it in a light cure, why, they would like it that way.

Q. Would you say an 85 per cent solution of brine was a mild cure? A. Yes, I would.

Q. Have you had experience with cures of other types of fish, such as salmon?

A. Yes, any mild cured salmon.

(Testimony of James C. Gow.)

Q. Do you know what percentage of brine is used in mild cured salmon? A. 100 per cent.

Q. Would it be your opinion, therefore, that 85 per cent solution is a mild cure?

A. Yes, sir.

Q. Mr. Gow, I am just wondering, in assuming the various factors that Mr. Hamlin asked you to assume, such as assuming that the herring was covered, and wetted down out on the dock, and that the temperature at Port Wakefield showed a maximum of sixty-six, and then further assuming that that herring, that he is asking you to assume is loaded aboard the Denali, and comes [434] to Seattle on this voyage, which, as it did, and was damaged to the extent that you saw it damaged when you inspected it on the fifth of September, is there any other cause or causes which could have produced that condition as you saw it there on September 5th?

A. I would like to have the question again.

(Last question repeated by the reporter.)

The Court: Any other cause other than what causes were stated?

Mr. Wakefield: Other than heat is what I am getting at.

A. Yes. As I stated before if the fish was not fresh at the time it was caught; if it had been held too long or if it hadn't been properly cured.

Q. (By Mr. Wakefield): How about the factor of being too mildly cured?

A. Well, too mildly cured; if it is too mildly

(Testimony of James C. Gow.)

cured, naturally, the fish deteriorates. The curing is what holds herring or holds salmon or any other product. If you want to hold it and not carry it in refrigeration and put enough salt with it, you can carry it with enough cure in ordinary storage [435] if you give it enough salt. The heavier the cure, the more the product will last.

Q. When does the cure take effect with respect to the packing of the fish in barrels?

A. After salmon or herring is packed, it is allowed to lay for about four or five days, as I understand it, to let that cure take hold—let the salt take hold. Then they open the bung of the barrel and take the brine solution, and they add one hundred per cent brine to it. And then when it comes out of the cold storage for shipment that brine is again checked and if the solution is below 100 per cent, they bring it up to 100 per cent. I am talking about salmon there. In herring they bring it up to 85 or 90 per cent.

Q. What I am talking about is whether or not in the curing of herring, the curing takes place at the outset, let's say the first five or six days that the barrel is packed and then becomes fixed or does the curing continue week after week?

A. I believe it becomes fixed. There may be some curing goes on after that, but as far as I understand it, within the first three or four days that the actual cure is taking place, then after that the brine holds the fish. The reason for increasing [436] the brine when you find the brine is

(Testimony of James C. Gow.)

down is by reason of the fact that the juice or the liquids of the fish come out and dilute the brine.

Q. And that is the purpose of rebrining?

A. Yes.

The Court: Did you interest yourself in the length of time that this shipment remained on the open dock, not under shelter, at Seattle, before you examined it?

The Witness: That it laid on the dock in Seattle, sir?

The Court: Yes—on the open dock exposed to sun and weather.

The Witness: It wasn't on the open dock. It went into the warehouse.

The Court: It went immediately into the warehouse when it was discharged, did it?

The Witness: Bell Street is a very small apron on the dock. It is closed dock from there on in.

The Court: Is it your information that these barrels of herring as they were discharged from the ship were stowed temporarily immediately under the shed of the warehouse?

The Witness: Yes, sir.

The Court: Do you recall what number were [437] discharged before the strike commenced on the 5th of September and how many of the barrels were discharged after the strike terminated on or about the 25th of September.

The Witness: Those in the number 3, your Honor, were discharged prior to the strike.

The Court: All of those in number 3?

(Testimony of James C. Gow.)

The Witness: Yes. Number 3 was discharged—

The Court: How many do you think?

The Witness: There was 971, I think. 971 half barrels from number 3 hold. Number 3 hold was discharged prior to the strike.

The Court: Were there any barrels discharged from number 4 hold?

The Witness: Not at that time. The number 4 was discharged later.

The Court: That is, after the strike?

The Witness: Yes, sir.

The Court: Is it your information that no barrels were discharged out of number 4 hold before the strike set in.

The Witness: Yes, sir.

The Court: That is all I wish to ask this witness.

You may inquire. [438]

Mr. Wakefield: I have no further questions.

Mr. Hamlin: I have no further questions.

The Court: You may be excused from the stand.

(Witness excused.)

The Court: Call the next witness.

Mr. Wakefield: If the Court please, the Respondent rests.

The Court: Is there any rebuttal testimony?

Mr. Hamlin: Yes, your Honor; very slight.

Captain Perry.

CAPTAIN L. E. PERRY,

recalled as a witness by and on behalf of the Libelant, having been previously sworn, was examined further and testified as follows:

Direct Examination

By Mr. Hamlin:

Q. Captain Perry, at the time that you were down in number 3 hold of the S.S. Denali on September 5, 1946, I ask you whether or not you made any inspection of [439] the alleyways—the shaft alleys in number 3 lower?

A. I made an inspection. Outside of the alleyways as you can see them from number 3.

(Report of Survey marked Libelant's Exhibit 17 for identification.)

Q. Did you enter inside the shaft alleys?

A. I did, but I had to go through the engine room.

Q. Did you see any steam pipes therein?

Mr. Wakefield: I object to this, if the court please, as not proper rebuttal.

The Court: Is it your contention that if admissible at all it should have been as a part of Libelant's case in chief?

Mr. Wakefield: Yes, your Honor. This witness was a witness in chief and said he was down there and inspected this hold and testified about it. We are not rebutting. That was a part of his direct examination.

The Court: Any response?

Mr. Hamlin: Yes, your Honor. He was not

(Testimony of Captain L. E. Perry.)

asked anything about steam pipes on the Libelant's case in chief because the libelant did not undertake to prove at that time any specific things about the generation of heat in the hold. [440]

The Court: What has happened in Respondent's case that causes you right now to do this when you didn't do it before?

Mr. Hamlin: Respondent has stated that this hold was a proper hold in which to carry salt herring, in an effort to rebut the presumption of negligence which arose upon the conclusion of the libelant's case. Whether or not they have done so—I am not making any comment about that—but it is nevertheless incumbent I feel upon the libelant to meet such proof and the respondent has introduced in support of its stand that it was not guilty of negligence.

The Court: Did the libelant in its questions ask any questions concerning steam pipes?

Mr. Hamlin: I do not believe it did, your Honor.

Mr. Wakefield: The witness testified to the taking of temperatures down in the hold on the afternoon of September 5, 1946—he and Mr. Kniseley together.

The Court: What witness was it and whose witness was it who testified concerning steam pipes and the joints and fittings; was there any such testimony by any witness before this?

Mr. Hamlin: Mr. Felton, a marine engineer of [441] respondent, and Mr. Gow was interrogated about the steam pipes.

(Testimony of Captain L. E. Perry.)

The Court: The objection is overruled. Read the question.

(Last question repeated by the reporter as follows:

“Question: Did you see any steam pipes therein?”

A. Yes, there were steam pipes in the shaft alleys which were on the port and starboard side of number 3 and number 4 hatches.

Q. (By Mr. Hamlin): Where were the steam pipes located within the shaft alleys, on which side and where?

A. They were on the inboard side of the lower part of the arc of the circle at the top is what I mean by that. They weren't directly up in the crown of the arc but they were on the inboard side towards where the cargo was stowed.

Q. Were the steam pipes insulated?

A. In part, yes.

Mr. Wakefield: I move that be stricken as not being responsive “in part”.

The Court: The motion is denied. [442]

Q. (By Mr. Hamlin): Will you explain that please, Captain?

A. They were insulated or lagged as we call it except at the joints and approximately two inches from the actual flanges. That is to allow for repairs in case of damage.

I further noticed that some of the joints were leaking while I was there. I also noted in the engine room that there was quite a stream of water

(Testimony of Captain L. E. Perry.)

coming from somewhere and the vessel was developing a port list—this was hot water as well—and when I completed my investigation, I called Mr. MacClelland to tell him that he had better get someone down there, that there was something leaking in the engine room; and he in turn asked me what the hell I was doing down there. I says, “Well”—

The Court: What date was this?

The Witness: September 5th, sir.

The Court: What hour of the day was that?

The Witness: This was—oh, it would be approximately 3:30 in the afternoon.

The Court: What time did the strike become effective on that day?

The Witness: Well, I believe that it was at midnight that they completed the discharge. [443]

The Court: Of the 5th?

The Witness: Well, the 4th midnight or the morning of the 5th.

The Court: When did the crew leave the ship, do you know, on the 5th?

The Witness: Not from my personal knowledge, no, sir.

The Court: Do you have any information about it?

The Witness: Just from the testimony that I heard that they finally got off at 10:30 in the morning.

The Court: And this water that you saw was in the afternoon following that hour previously mentioned?

(Testimony of Captain L. E. Perry.)

The Witness: On the same day in the afternoon.

The Court: You may inquire.

Q. (By Mr. Hamlin): Captain Perry, have you ever been required to exercise discretion with reference to the actual stowage of cargo in your experience? A. I have.

Q. In what capacity?

A. I was mate and master of vessels.

Q. Approximately how long were you engaged in such occupation? [444]

A. Well, I was third mate from 1921 to approximately '23 where I had charge of the foreward deck of the vessels. Then I became second mate where I had charge of the after deck of vessels, stowage—noting the stowage and reporting any poor stowage to the Chief Officer. Then I became Chief Officer where I had charge of the entire vessel, which—the main one carried about 12,000 tons of cargo.

Finally, I became Master of the same vessel. Later I came ashore and was appointed Surveyor of the Board of Marine Underwriters from which time I have still had the say of stowing, on the correction of improper stowage of cargo.

Q. Considering all of the factors which you have observed, will you please state your opinion of whether the stowage of the 1358 barrels of salt herring in suit herein in lower number 3 and number 4 holds of the Denali was proper stowage or improper stowage.

Mr. Wakefield: That is objected to, if the Court

(Testimony of Captain L. E. Perry.)

please, as not proper for the following reasons:

First, the witness has not been shown to be qualified to express an opinion as to the stowage of mild-cured salt herring; secondly, the question doesn't include in it any of the facts with respect to the character of the hold or the conditions of [445] stowage or the length of the voyage, or the degree of cure given to the fish, or the condition that it was received in. I think it can't aid us because this man never saw the fish or the hold, or the stowage until after the ship was shut down for six or eight hours, and the cargo was out of the hold. It is improper, and not qualified. It is an improper hypothetical question, also.

Mr. Hamlin: I think three of Respondent's witnesses have stated, in their opinion, this particular stowage was proper—the stevedoring foreman, and the stevedoring superintendent, and Mr. Gow. I feel it is incumbent upon the Libelant—he certainly has a right to rebutt such evidence.

The Court: The objection is overruled. He may answer the question.

(Last question repeated by the reporter.)

A. I would say it was very improper stowage, for the reason—

Mr. Wakefield: You have answered the question.

Mr. Hamlin: Would you state your reasons, why you feel it is.

A. Yes, in number three, the herring—

Mr. Wakefield: Pardon me, for interrupting. I just want to note the same objection. [446]

The Court: Overruled.

(Testimony of Captain L. E. Perry.)

A. In number 3, I learned from stevedores, and persons who had seen it, that the herring was stowed in between the shaft alleys, and that, in turn, was over-stowed with cases of canned salmon, which did not allow for any ventilation on the herring.

And with your heat— [447]

Mr. Wakefield: May I interrupt the witness? I don't know whether it is proper for me to do so, but I submit this is improper, because the only evidence in the case, your Honor, shows conclusively that the herring in number 3 hold was not over-stowed with anything. It has been so testified.

The Court: The Court being the trier of the fact, is charged with a recollection of what the testimony is, and the value of the testimony of this nature depends upon the accuracy of the constituent facts which form the basis of the consideration given by the witness, to the question, in his answer.

You may continue your answer.

A. (Continuing): The herring was over-stowed in number 3, with cases of canned salmon, which blocked any ventilation. Then, having it in between the alleys with steam pipes on either side, which had live steam running through them for the entire voyage, which ran back to the steering engine, plus the normal heat of the engine room, you have created a hot pocket, in between the alleys.

(Testimony of Captain L. E. Perry.)

In number four, from my personal observation, I noted the canned salmon was stowed over the herring in this manner, and it is logical to assume that the chief officer who was in charge stowed it the same way in number 3. [448]

In my opinion, the reason for the improper stowage is the covering of it with canned salmon which allowed no ventilation. The heat that it received, in my opinion, cooked the herring. There isn't a shadow of a doubt in my mind, that that is what happened.

Q. (By Mr. Hamlin): You have before you what has been marked Libelant's Exhibit 17 for identification? A. I have.

Q. Will you tell us what that is please?

A. That is a report, made by myself, on this subject.

The Court: When was the report made that you have referred to?

The Witness: On the survey, sir, it was made September 5, 1946. The actual report was written February 3, 1947, and subsequent dates after September 5th.

Q. (By Mr. Hamlin): From what records, if any, did you compile the report?

A. Well, from my own pencilled notes in my notebooks.

Q. When were those notes taken?

A. They were taken at the time we were making the survey, as we went along.

Q. To whom was this report rendered?

(Testimony of Captain L. E. Perry.)

A. It was made at the request of James Farrel & Co. [449]

Mr. Hamlin: I offer Libelant's Exhibit No. 17, in evidence.

Mr. Wakefield: That is objected to, if the Court please. It seems almost elementary that a survey report of this kind is not admissable. The witness is here. It is a self-serving declaration. It is hearsay. It is prejudicial and immaterial. Mr. Gow's Survey Report certainly was unadmissable, but I didn't offer it.

The Court: Lawyers of the eminence of both counsel on both sides of this case must have easy access to some highly persuasive authority as to whether or not the Certificate and Report of a Marine Surveyor is admissable in evidence. The Court is going to take a recess of ten minutes, and is going to charge counsel on both sides, with responsibility of producing authority on the question, one way or another.

(Recess.)

The Court: I ask the witness to resume the stand, and I will hear the counsel further, now, on the admissability of Libelant's Exhibit 17.

(Argument presented to the court by respective counsel for Libelant and Respondent.)

The Court: The Court will be just as frank in commenting upon the Court's own impressions on this matter, and original impressions, as I have been in my comments about how well informed the judges and admiralty lawyers ought to be on this question.

I am very frank to admit before counsel and others interested in this case, that I came to this Court as a judge of it, with the impression very distinct in my mind, growing out of what experience I had had as an admiralty lawyer, that usually the survey reports of marine surveyors were admissible in evidence as such. That is a very distinct impression in my mind as to the law relating to such subjects. I find now, by a review of this statement in Benedict, that it is a statement which the Court must receive as modifying my impression which I have just mentioned.

Libelant's Exhibit No. 17, Marine Surveyor's Report as to damage, was dated and apparently executed by the witness now on the stand, on the date of February 3, 1947. This witness' survey and inspection were made beginning on or about the 4th or 5th of September, 1946. That is approximately five months prior to the making and [451] executing of this survey and report, dated February 3, 1947. Such a document, made after such a long lapse of time, could not in any real sense be regarded as an integral part of the work done by him at the time of his inspection and survey. Too much time has elapsed to be a part, and a necessary part, of the duty performed by him, at the time he commenced and performed his inspection and survey.

Adverting now to Libelant's Exhibit No. 12, which is a report made by Peter A. Wahl, and received by this Court in evidence as Libelant's

Exhibit 12, that exhibit was received in evidence by the Court primarily upon the theory that it was a record made upon a business matter then being attended to by the witness making it, by virtue of a business assignment, respecting a material issue in this case, and the Court admitted in evidence that exhibit, Libelant's No. 12, primarily on the theory that it was a business record made at the time the business was done, or approximately about that time. The contents of the exhibit tend to throw some light upon a material issue in this case.

This Libelant's Exhibit No. 17, doesn't meet that test at all. [452]

In view of the statement in *Benedict 3 Benedict*, Adm., page 8, Sec. 381 b, which may impliedly suggest that the Courts are now inclined to limit the field for application of the rule expressed in the case (*The Mason*, 249 Fed. 718) relied upon by Mr. Hamlin admitting a marine surveyor's report, it would seem the Court should not admit in evidence this Libelant's Exhibit No. 17. As a matter of fact, I feel that it should not be admitted because of the great lapse of time between the doing of the survey, and the making of the survey report. That is primarily my own reason for excluding it.

The objection to the admission of it is sustained.

(Discussion off the record in re time for final arguments in the case.)

The Court: This case is set down for argument by counsel on the merits, on Thursday afternoon at 2:00 o'clock, the 22nd of July.

I ask counsel to file their briefs in this case, on the law, and any comments they may want to make on the facts, on or before Monday afternoon.

Counsel are excused, subject to those conditions.

(At 11:50 o'clock a.m., Friday, July 16, 1948, proceedings adjourned until 2:00 o'clock, p.m., July 22nd, 1948, in the United States Court House.) [454]

Seattle, Washington

July 22nd, 1948, 2:00 o'clock, p.m.

(All parties present as before.)

The Court: In the case of the Apex Fish Co., vs. the United States of America, Cause No. 15091, continued to this date for further proceedings, I wish to advise counsel that I have studied the briefs filed by counsel on both sides in this case, and I am now prepared to hear the oral argument on the merits.

I understand that it now remains for counsel to argue the case upon the merits, and for the Court to thereafter decide the case.

I will now hear Libelant's opening argument. You may address the court from your present stations.

(Final arguments presented to the court, by respective counsel for the Libelant and Respondent.) [455]

COURT'S DECISION

The Court: Much of the law which libelant has cited in support of the libelant's position in this case is applicable to cargo not concealed in sealed containers. In the case at bar the cargo of mild salt cured herring was contained in sealed barrels continuously from the beginning of the curing process in Alaska until the cargo was discharged from the ship at Seattle, except when each barrel was opened to check brine and add more herring to take up shrinkage.

The Court is not convinced from the evidence that any thorough inspection of the cargo was ever made from the time the herring was first put in the barrels until the cargo was discharged from the ship at Seattle, although the witness, Wakefield, in effect testified that the condition of the herring already in the barrels was always observed when they were checked for shrinkable and supplied with additional herring to fill up the shrinkage during the curing process, and that the herring in question was subjected to that check up.

The witness Wakefield, gave detailed testimony as to the history of this cargo and its care and conditioning. He testified as to the delivery from [456] the fishing boats of fresh herring at his saltery at Port Wakefield. He testified as to the culling out of bad fish and as to the care and attention given the fresh herring preparatory to subjecting it to the curing process. He testified to the care and attention given to the placing of the fresh herring in these barrels and of the introduc-

tion of brine and of the sealing of the barrels, and of the later opening of the barrels, draining off part of the brine and adding additional fish to take up the shrinkage. In effect he testified that the same care and grading of the herring in selecting sound and merchantable herring for the salt curing process were applied in this case as had been usually practiced at his saltery and that the same saltery process was applied to this shipment of herring, the same curing process, the same treatment of opening the barrels draining off part of the brine before the salt curing process was completed, and of adding more fresh herring to the barrels to take up the shrinkage, just as had been done in other salt curing processes at this plant, and that this salting process of this particular cargo was according to his usually practiced method.

There was no testimony to contradict that [457] testimony that the salt herring contained in these barrels, and the subject of this litigation, was the same kind of merchantable salt herring which this libelant had produced at the same saltery and shipped in other shipments at other times. There is no evidence to the contrary. Therefore, it seems to me that the Court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was, when it was received on board the ship at Port Wakefield, Alaska, as a matter of fact in apparent good order and condition.

It may be as contended by respondent that the

recitation in the bill of lading of "apparent good order and condition" should, in view of the fact that this cargo was in sealed containers, be applied as a matter of law only to the outward appearance of those containers rather than to the cargo contained in the containers. Accepting for the moment, for the purpose of considering the point, that such is the effect and the only effect of such recitation in the bill of lading, still the Court finds, concludes and decides from a preponderance of the evidence, here introduced as to the process I have already referred to, and as to the care and attention given to the curing process as shown uncontradicted by [458] all of the evidence upon that point in this case, that the condition of the contents of these barrels (and not merely the outward condition of the barrels themselves) was in fact in good order and condition when received on board this ship. There is nothing in the circumstance of storing some of the barrels containing some of the cargo on the face of libellant's dock at Port Wakefield for a few days awaiting the arrival of the ship which compels the inference that the contents of the barrels must have been damaged by reason merely of being stored for those few days on the face of that dock, in view of the favorable weather conditions for outside temporary storing of this kind of cargo at that season.

By a preponderance of the evidence it was further established that some of this cargo where it was stowed in the respondent's ship, either in number 3 lower hold or in number 4 lower hold

was, stowed in the space between the shaft alleys inside of which ran certain steam pipes, and that in that hold space there was an 80-degree Fahrenheit temperature 15 hours after the cargo had been discharged and only above five hours after a strike became effective and all hands left the ship. It may reasonably be inferred that the ship's machinery — [459] that which might produce heat in the hold as well as that which might cool the heat out of the hold—had been shut down at the time the strike became effective. However, it seems to the Court that the inference is compelling that there were an excessive temperature and heat in that cargo space at and before the time of the discharge of this cargo, and that such excessive temperature and heat caused the cargo damage here complained of. There was some oral testimony to the effect that while the unloading of the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary.

The Court finds that at and before such time of discharge such temperature in the hold was excessive notwithstanding the fact that the respondent adduced testimony tending to show that inspections were made of the temperature in the hold at intervals during the voyage while the cargo was aboard respondent's ship and found no excessive temperature in the hold at the time the inspections were made, and notwithstanding other testimony that at another or other times so excessive heat was found by others of respondent's witnesses.

The Court also has considered the evidence now [460] before the Court in the form of Libelant's Exhibit 16 which establishes among other facts that other cargoes of this same character and cargoes of perishable and semi-perishable nature had previously been successfully carried in this cargo space, and further that on this same voyage cargo of this very same kind was successfully carried, without experiencing damage, from another Alaskan port, namely, Port Vita, to the same port of destination as that at which Libelant's cargo was discharged. But Libelant's Exhibit 16 discloses the fact that the Port Vita shipment was stowed not in numbers 3 or 4 holds but in number 1 lower hold.

The evidence does not affirmatively show in number 1 hold conditions different from those in numbers 3 and 4 respecting machinery or heating pipes or heat transmitting pipes which might cause any difference in temperature; but counsel for libelant has argued there were not, and the evidence does not indicate that there were, any heating pipes or steam pipes running through or along side or anywhere near that number 1 hold space, because it is forward of the engine room and not aft of the engine room.

As already indicated, the Court concludes that by a preponderance of the evidence it is established [461] that the contents of these barrels of salt cured herring were received on board this ship at Port Wakefield at the beginning of this voyage in good order and condition, and that, the libelant having

established that fact, the burden in this case shifted to respondent to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment, or that that damage was caused by inherent vice of the contents of the barrels. This burden respondent has not sustained. Indeed, the preponderance of the evidence compels the Court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in number 3 and 4 holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4, during the voyage and before discharge of the cargo on or before the 4th day of September, 1946, although the damage may have possibly increased in degree during the strike after that date, but, if so, the amount of such increase if any is not ascertainable from the evidence now before the Court.

For the reasons stated the Court does find, [462] conclude and decide this case in favor of the libelant and against the respondent for the difference in the market value of this cargo at Seattle, if it had there been in like condition as when shipped, and its actual condition in which it was when there discharged, plus the normal and necessary charges expended in connection with this shipment which would ordinarily have been experienced in connection with the normal movement of any other similar shipment under like circumstances in moving such a shipment at the Port of Seattle. As to those ex-

penses, if there are any further questions the Court will consider them upon the request of counsel.

(At 4:55 o'clock p.m., Thursday, July 22nd, 1948, proceedings concluded in the United States Court House.)

Concluded. [463]

CERTIFICATE

I, Merritt G. Dyer, Official Reporter for the United States District Court, hereby certify that as such official reporter I recorded the foregoing proceedings stenographically and the same have been reduced to typewriting under my personal supervision.

I further certify that all the foregoing record is a full, true and correct transcript of the proceedings occurring therein.

/s/ MERRITT G. DYER,

Official Court Reporter.

[Endorsed]: Filed Nov. 29, 1948. [464]

[Endorsed]: No. 12105. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Apex Fish Company, a corporation, Appellee. Apostles on Appeal. Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed December 2, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12105

THE UNITED STATES OF AMERICA,

Appellant.

and

APEX FISH COMPANY,

Appellee,

APPELLANT'S STATEMENT OF POINTS ON
APPEAL AND DESIGNATION OF PARTS
OF THE APOSTLES.

Comes now the appellant and herewith files in this Court its statement of points upon which appellant intends to rely on appeal, and designates the Apostles on Appeal necessary for the consideration and determination thereof pursuant to Rule 19(6) of the rules of this court as follows:

1. Appellant adopts its assignment of errors in this cause as heretofore filed with the United States District Court for the Western District of Washington in this cause in connection with the appeal and as included in the Apostles on Appeal, as the statement of points upon which appellant intends to rely on appeal.

2. Appellant designates all of the Apostles on Appeal, including therein all pleadings filed and testimony and exhibits admitted in evidence at the trial of this cause, as necessary for the considera-

tion and determination of said appeal and of the points relied upon by appellant on said appeal.

/s/ J. CHARLES DENNIS,
United States Attorney
/s/ BOGLE, BOGLE & GATES,
/s/ CLAUDE E. WAKEFIELD,
Of Counsel.
Proctors for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 2, 1948. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

ORDER—OMITTING PRINTING OF
EXHIBITS

Appellant and appellee having stipulated that the following exhibits be omitted from printing in the apostles on appeal due to the immateriality of some exhibits and due to the unprintable and cumbersome nature of all of said exhibits and that the original exhibits be used in lieu of printing the same, and that the substance and material facts of all of said exhibits otherwise appear in the transcript of the proceedings in this cause, now, therefore, good cause appearing; it is

Ordered that printing of the following exhibits in the apostles on appeal be omitted and that the said exhibits be used upon appeal in their original form, to-wit: Libelant's Exhibits Nos. 1, 2, 3, 4, 5,

6, 8, 9, 10, 14 and 15; Respondent's Exhibits Nos. A-1, A-2, A-3, A-4, A-5, A-6, A-7 and A-8.

/s/ WILLIAM DENMAN,
Judge of the United States Court of Appeals for
the Ninth Circuit.

Approved:

/s/ J. CHARLES DENNIS,
United States Attorney
/s/ BOGLE, BOGLE & GATES ,
/s/ CLAUDE E. WAKEFIELD,
Proctors for Appellant.
/s/ EDWARD M. HAY
and
/s/ DAVID A. HAMLIN,
Proctors for Appellee.

STIPULATION—OMITTING PRINTING OF EXHIBITS

It is stipulated by appellant and by appellee that the following exhibits admitted in evidence by the trial court at the trial of the above cause need not be printed or reproduced in the transcript of proceedings in the above cause and may be omitted from the printed apostles on appeal, and that said exhibits be used in their original form, to-wit:

Libelant's Exhibit No. 1. Article of Incorporation of Libelant;

Libelant's Exhibit No. 2. Minutes of Stockholders of Libelant;

Libelant's Exhibit No. 3. Certificate of Dissolution of Libelant.

That there is no issue in this cause or upon appeal to which the foregoing exhibits apply.

Libelant's Exhibit No. 4. Large chart;

Libelant's Exhibit No. 5: Large chart;

Libelant's Exhibit No. 6. Bill of lading;

Libelant's Exhibit No. 8. Photograph;

Libelant's Exhibit No. 9. Weather report;

Libelant's Exhibit No. 10. Weather report;

Libelant's Exhibit No. 14. Group of bills and invoices;

Libelant's Exhibit No. 15. Group of bills and invoices.

Respondent's Exhibit A-1—Log Book

Respondent's Exhibit A-2—Hatch list

Respondent's Exhibit A-3—Cargo Stowage Plan

Respondent's Exhibit A-4—Blue Print of Vessel

Respondent's Exhibit A-5—Hatch list (not admitted)

Respondent's Exhibit A-6—Letter and meteorological data

Respondent's Exhibit A-7—Cargo receipt

Respondent's Exhibit A-8—Hatch book.

That the foregoing exhibits are not of a printable nature and their inclusion in the printed record

would be cumbersome and impractical, and that the substance or material portions of most of said exhibits appear in the record and the material facts established by said exhibits appear otherwise in the testimony of the witnesses and in the transcript of the proceedings generally.

/s/ J. CHARLES DENNIS,

United States Attorney

/s/ BOGLE, BOGLE & GATES,

/s/ CLAUDE E. WAKEFIELD,

Of Counsel.

Proctors for Appellant.

/s/ EDWARD M. HAY

and

/s/ DAVID A. HAMLIN,

Proctors for Appellee.

[Endorsed]: Filed December 2, 1948. Paul P. O'Brien, Clerk.

No. 12105

IN THE
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For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

APEX FISH COMPANY, a corporation,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
UNITED STATES OF AMERICA

J. CHARLES DENNIS,
United States Attorney.

BOGLE, BOGLE & GATES,
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(Of Counsel)

Proctors for Appellant.

603 Central Building,
Seattle 4, Washington.

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603 Central Building,
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IN THE
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COURT OF APPEALS
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF
WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
UNITED STATES OF AMERICA

1

STATEMENT OF JURISDICTION

This is an appeal from a final decree of the United States District Court for the Western District of Washington, Northern Division, in admiralty. The action was instituted by filing a libel in personam under the Suits in Admiralty Act (46 U. S. C. §742, et seq.) (Aps. 2, 24) by Apex Fish Company, a corporation, seeking recovery from the United

States of America of \$19,321.89 alleged damages to a shipment of 1358 barrels of mild cured salt herring, due to alleged improper stowage of said cargo on board the SS "DENALI," which vessel was then being operated under bareboat charter to the United States of America. The decree of the court awarded damages against the United States of America as bareboat charterer of the vessel and pursuant to terms of the Suits in Admiralty Act, *supra*, in the sum of \$18,783.92. The United States of America has appealed from this decree.

This action being cognizable in admiralty, to-wit, alleged damage to cargo being carried on board a vessel under bareboat charter to the United States of America, is governed by the Suits in Admiralty Act (46 U. S. C. §742, et seq.). Action is properly brought against the United States in the District Court (46 U. S. C. §742) (28 U. S. C. §1333). From the final decree in appellee's favor, an appeal may be taken to this court (28 U. S. C. §§1291, 1294).

2

STATEMENT OF THE CASE

A. *Facts.*

This is a case of alleged *concealed cargo damage*. 1358 barrels of mild cured salt herring were loaded on board the SS "DENALI" (Voyage 55) in No. 3 and No. 4 lower holds in the usual manner and in

apparent good order and condition and were subsequently discharged in apparent good order and condition. Upon opening some of the barrels for inspection, the shipper-consignee found the contents of many of the barrels to be in various stages of decomposition and spoiled.

The SS "DENALI" is a combination cargo and passenger steamship regularly engaged in the Alaska trade. It arrived at appellee's saltry at Port Wakefield, Alaska (on Rasberry Island near Kodiak) on August 23, 1946, to load the said herring, which had been processed and packed there. At that time about 400 of the barrels were piled on the face of the dock, uncovered and exposed to the elements (Aps. 276, 308-310). The balance of the shipment was piled just inside the large open front door of the saltery and immediately adjacent to the face of the dock (Libelant's Ex. 8). The shipment consisted of 110 quarter-barrels, 119 half-barrels of large herring and 1129 half-barrels of medium herring, but as no segregation has been made and no issue is presented involving the difference in the barrels, they are dealt with herein without regard to such size or contents.

Loading was first into No. 3 lower hold, between the two shaft alleys. After 971 barrels had been loaded, several tiers high, the balance of the shipment consisting of 387 barrels was stowed in No. 4

lower hold, likewise between the two shaft alleys. The "DENALI" is a twin screw vessel and the two shaft alleys run through No. 3 and No. 4 lower holds with cargo space in between. (Aps. 288-291). No other cargo was placed in either hold during the voyage except cases of canned salmon in the wings of No. 3 lower hold, and cases of canned salmon in No. 4 lower hold, some of which were overstowed on top of the 387 barrels in that hold (Aps. 382).

Appellant issued a clean bill of lading for the shipment. Only ordinary stowage was requested and contracted for this shipment, and no contention is made that the vessel was obligated to furnish cold storage or cool room stowage. It is conceded that only ordinary stowage was required or expected (Aps. 164, 277).

The "DENALI" sailed from Port Wakefield on August 24, 1946, and proceeded to nearby Port Vita, where about 1000 barrels of salt herring were loaded into No. 1 lower hold. This shipment subsequently outturned from the vessel in good condition (Aps. 378).

Canned salmon was loaded in No. 4 lower hold at Port Bailey, August 24th and 25th, and more canned salmon was loaded into No. 3 lower hold at Shearwater Bay and Moser Bay on August 27th and 28th, respectively. There was no other loading

into holds No. 3 or No. 4 on the voyage in question (Aps. 381).

The "DENALI" had a usual summer voyage and nothing occurred on the vessel during the voyage in question which would have had any bearing upon the question of damage to cargo, and no issue is raised as to any defect or unseaworthiness of the vessel (Aps. 293). The stowage of the barrels of salt herring in No. 3 and No. 4 lower holds is usual and customary stowage, and has been done on this vessel on many occasions before and after the voyage in question, without any damage (Aps. 295, 408—Libellant's Ex. 16).

On September 4, 1946, the day after arrival at Seattle, the 971 barrels in No. 3 lower hold were discharged to the dock, beginning at about 9 o'clock P. M. (Aps. 322). When about 100 barrels had been discharged, the shipper-consignee, or its representative, started to open some of the barrels for inspection and then found that the herring in some of the barrels were in unfit condition, and concluded that the condition was attributable to heat (Aps. 324).

A general maritime strike became effective at midnight of the same evening, or on September 5, 1946, and the "DENALI" was shut down (Aps. 329). The 387 barrels of herring in No. 4 lower hold could not be discharged and remained in the vessel

until September 25, 1946, at which time these barrels were discharged and were found in the same general condition as those barrels discharged from No. 3 lower hold (Aps. 358). Generally, however, these barrels from No. 4 lower hold were in a less deteriorated condition than many of those discharged from No. 3 lower hold (Aps. 224).

This suit is to recover the damage to the barrels of herring alleged to have had a sound value of \$27,876.00, less the proceeds of sale of the damaged herring amounting to \$10,329.00, leaving an alleged net loss of \$17,547.00, plus expenses amounting to \$1,236.92. There is no issue raised on appeal as to the extent of appellee's loss if appellant is liable therefor.

B. *The Law.*

(1) In cases of concealed damage to cargo such as the contents of barrels of mild cured salt herring, no presumption of good order and condition at the time of shipment results from the bill of lading recital of apparent good order and condition, and appellee has the burden of proving actual good order and condition at time of shipment.

The Dondo, 287 F. 239 (S. D. N. Y.);

Monnier v. United States, 16 F. (2d) 812 (E. D. N. Y.), Affirmed 16 F. (2d) 815 (C. C. A., 2);

George F. Pettinos, Inc. v. Thos. & Jno. Brocklebank, 65 F. Supp. 102 (E. D. N. Y.);

The Niel Maersk, 91 F. (2d) 932 (C. C. A., 2)
Cert. den.. 302 U. S. 753;

Albers Bros. Milling Co. v. Hauptman, 95 F.
(2d) 286 (C. C. A., 9).

(2) Where the nature of the damage to the cargo, e. g., spoilage of salt herring in barrels, is not peculiar to nor characteristic of damage which would occur as a result of negligence or unseaworthiness of the vessel, and is characteristic of the inherent vice of the cargo (subject to decay and putrescence), appellee has the burden of proving that the damage actually did occur upon the vessel and as a result of negligence or unseaworthiness. This is not a case of the carrier seeking exoneration from a loss or damage admittedly or presumptively caused by the vessel, and relying upon bill of lading or Carriage of Goods by Sea Act exceptions. Here the issue is whether the appellant carrier was in any manner responsible for the damage, in a physical sense. Otherwise stated, did the decay commence from conditions aboard the vessel at all, as distinguished from bad condition of the fish at time of shipment, or inherent vice?

The Niel Maersk, supra, distinguishing the decision in *Schnell v. The Vallescura*, 293 U. S. 296;

Albers Bros. Milling Co. v. Hauptman, supra, approving *The Niel Maersk*;

The American Tobacco Co. et al. v. S. S. Katingo Hadjupatera, et al., 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948).

(3) If the barrels of herring were given usual and customary stowage and nevertheless spoiled while on the vessel, such condition is the result of inherent vice of the cargo and the vessel is not liable unless the appellee sustains the burden of proving actual negligence or unseaworthiness.

The Rangoon Maru, 1926 A. M. C. 1629 (S. D. N. Y.), affirmed 27 F. (2d) 722 (C.C.A., 2);

The American Tobacco Co. et al. v. S. S. Katingo Hadjupatera, et al., supra;

Bache v. Silver Line, 110 F. (2d) 60 (C.C.A., 2).

(4) The exception of "strike" applies to the 387 barrels of herring stowed in No. 4 lower hold which could not be discharged due to the general maritime strike until September 25, 1946, a delay of 21 days after the vessel would have been discharged but for the strike.

The Maui, 113 F. (2d) 1018 (C. C. A., 9).

C. Questions Involved.

(1) Did appellee sustain the burden of proving the good order and condition of the barrels of herring at time of shipment, having consideration for the voyage undertaken and that only ordinary stowage was contracted for?

(2) Did appellee sustain the burden of proving that the barrels of herring were damaged from any physical cause or peculiar condition on board the vessel?

(3) Did appellee sustain the burden of proving that the barrels of herring were damaged as a result of some negligence or unseaworthiness of the vessel, to-wit, heat in the No. 3 and No. 4 lower holds?

(4) Was the stowage afforded this cargo reasonable and proper under all of the circumstances known to both parties, to-wit, the inherent vice of the cargo?

(5) Was the damage to cargo in No. 4 lower hold (387 barrels of herring) due to unavoidable delay in discharging the vessel on account of the general maritime strike in effect between September 5, 1946, and September 25, 1946; and was there any ground whatever for finding that damage to the 387 barrels of herring in No. 4 lower hold was attributable to conditions in that hold during the voyage, rather than unavoidable delay in discharging that hold on account of the general maritime strike in effect between September 5 and September 25, 1946?

D. Manner in Which the Questions Are Raised.

The foregoing questions are presented here upon appellant's exceptions taken and allowed to the findings of fact and conclusions of law entered by the lower court on August 2, 1948 (Aps. 81, 82), with judgment and decree resulting therefrom in favor of appellee in the sum of \$18,783.92.

Appellant by assignment of errors presents the errors claimed, not on the basis of findings of fact upon a conflict in the evidence, but on the basis of findings of fact made by the lower court not based upon any material evidence in the case and contrary to the preponderance of the evidence, and also upon the basis of erroneous application of the law by the lower court in the matter of burden of proof, all in the following respects:

(1) The lower court found and decided that the barrels of herring were in good order and condition when put aboard the vessel. This finding was premised entirely upon the evidence of appellee as to the usual and customary method of processing and packing mild cured salt herring, and that this process was followed with respect to the barrels in question in this case. No actual inspection was made by anyone at the time of shipment or immediately before shipment, and the court's conclusion is not warranted even though appellee's evidence be accepted at face value.

Appellant's evidence tending to show probable bad condition at time of loading, such as the fact that about 400 barrels were stored on the face of the dock without cover and were dry and warm to the touch, is not convincingly controverted. The packing dates show many of the barrels to have been thirty days old when loaded and stored during

all that time in ordinary open warehouse. None of the barrels were less than two weeks old at the time of shipment.

It is appellant's contention that the court found good order and condition on no evidence, or on insufficient evidence. This is not a case of conflicting evidence where a presumption exists in favor of the findings of the Trial Court. This is a case of a finding based upon no material evidence and not supported by the uncontradicted evidence. Lastly, there is certainly no preponderance of evidence to sustain appellee's burden of proof.

(2) The lower court found that the barrels of herring were damaged by excessive heat in No. 3 and No. 4 lower holds during the voyage, for which the vessel was liable.

This finding is not based upon any evidence in the case, nor is it warranted as a conclusion from any evidence. On the other hand, appellant's evidence, which is not controverted, establishes beyond question that No. 3 and No. 4 lower holds did not contain heat; that there is no source of heat therein; that herring and other perishable cargoes are successfully carried therein. Here again there is not a case of conflicting evidence, but rather a finding based on conjecture and not warranted as a conclusion from the uncontroverted evidence in the case.

(3) The lower court erroneously held that the *appellant* was required “* * * to prove by a preponderance of the evidence that nothing occurred in the course of the voyage which did actually damage or might reasonably have been expected to damage this shipment * * *,” and that appellant failed to sustain this burden of proof (Aps. 457).

There are two objections to this. First, the burden of proof does not rest upon appellant but rests upon appellee to prove that the barrels of herring were in fact damaged by a physical cause on board the vessel, i. e., that the contents of the barrels were damaged by artificial heat created by the vessel, as distinguished from mere normal atmospheric temperature and that there was in fact excessive heat in No. 3 and No. 4 lower holds. Second, the preponderance of the evidence in the case affirmatively establishes without question that there was no artificial heat at all and certainly no excessive atmospheric heat in either hold. This latter proposition is not premised upon conflicting evidence, but is the only warranted conclusion to be drawn from all of the uncontroverted evidence.

It is well to call attention at this point to the fact that this is not the usual type of cargo damage case, where goods are known to have been damaged by the ship or while on board the ship, as can be inferred from the nature of the harm, such as salt

water damage, sweat, or visible breakage. Nor does appellant seek the benefit of Section 4(2)(q) of the Carriage of Goods by Sea Act (46 U. S. C., §1304), which casts upon the carrier the burden of proving lack of negligence, or exercise of due diligence. It is appellant's position that the cargo being found to have suffered concealed damage of an inherent nature (decay and putrescence) at a time or times unknown, appellee must prove that the damage resulted from some definite and improper or negligent cause or causes connected with the ship. No presumption of cause or negligence against a ship arises from decay and putrescence of the contents of barrels of mild cured salt herring, simply because they were carried on that ship.

(4) The court's decision is premised upon facts which do not appear anywhere in the record and upon clearly erroneous conclusions drawn from facts shown, all leading to the improper conclusion of the court that " * * * the preponderance of the evidence compels the court to find and conclude that the damage to the contents of these barrels of salt cured herring resulted proximately from excessive heat in Nos. 3 and 4 lower holds because of improper stowage and lack of care of the ship's cargo space, particularly holds 3 and 4 during the voyage and before discharge of the cargo on or before the 4th day of September, 1946 * * *."

Accepting appellee's evidence in full and appellant's evidence to the extent it is not controverted, no such finding, inference or conclusion can be made on the record of this case either as a matter of law or of fact.

3

ASSIGNMENTS OF ERROR RELIED UPON

A. First Assignment Relied Upon.

"2. That the court erred in making and entering Finding of Fact VIII in respect of finding that the shipment as received by respondent on board the S.S. DENALI at Port Wakefield, Alaska, on or about August 23, 1946, was then in good order and condition." (Aps. 85)

Finding of Fact VIII, attacked by the foregoing assignment of error, is as follows:

"That on August 23, 1946, libelant delivered to respondent at the port of Port Wakefield, Alaska, certain merchandise in good order and condition, to-wit, 110 quarter barrels of salt herring, 119 half barrels of large salt herring, and 1129 half barrels of medium salt herring to be carried from said port of shipment to the Port of Seattle, Washington, and there to be delivered in like good order and condition as when shipped to the order of James Farrell & Co. in consideration of an agreed freight and in accordance with the valid terms of a certain bill of lading on the WARSHIPSHORTBLADING form then and there signed and delivered to said shipper by the duly authorized agent or representative of the respondent." (Aps. 78)

The lower court apparently conceded the rule applicable to cases of concealed damage to cargo, re-

quiring the shipper to prove the actual good order and condition of the contents of the barrels at the time of shipment, and found and decided that appellee had sustained the burden of proof (Aps. 454).

Appellant contends, first, that there was no evidence of actual good condition at the time of shipment, for the intended voyage, and second, that the evidence produced by appellee was insufficient to sustain the burden of proof in any event.

(1) *The Evidence—Good Order and Condition.*

The only testimony in the case tending to have any direct bearing upon good order and condition is that of appellee's President and General Manager, Mr. Lee H. Wakefield (Aps. 101 to 140). He testified that all of the stock of appellee corporation was owned by himself and his family; that he had been in the "salt herring business" since 1916; that his duties were to "supervise, hire the men that did the work and also to sell the product"; that he had done gibbing and packing, curing and coopering himself at various times; that the plant located at Port Wakefield, about thirty miles from Kodiak, processes herring, herring meal and oil in addition to packing mild cured salt herring in barrels (Aps. 111). The plant consists of one building, with the boiler and the fish meal and oil portion of the plant at the inshore end and the saltery at the dock end

of the building. There is a small dock on the face of the plant building. No facilities exist for refrigerating or cooling any of the products (except atmospheric conditions), and after they are packed the barrels are stored in the plant itself and out on the dock when the company is getting ready to ship them to Seattle (Aps. 126).

In answer to the question—

“Will you please state in detail how salt herring is processed by Apex at that plant, commencing with the delivery of the fish by the fishermen at the dock?” (Aps. 111)—

the witness detailed the process followed in the packing and curing of the herring generally, including the segregation of fish for quality when first received at the plant (Aps. 111 to 116). Some fish are not in proper condition for packing because they contain black feed or because they are “soft and mushy” when received. The witness stated that the method of packing was standard, and had been followed by him since 1916, and was followed in packing the 1358 barrels involved in this action (Aps. 116).

These barrels of herring were packed at various times beginning on July 24, 1946, when 225 of the barrels were packed in one day, and up to August 10, 1946, when the last 53 barrels of the shipment in question were packed (Libelant's Ex. 7). These barrels were not shipped on the DENALI until August

23, 1946, and were therefore held at the plant for from 13 days to 30 days up to the time of the shipment.

The barrels were stored during this time in the plant. The witness testified the plant was cool, as the floor was rather wet (Aps. 124). After repacking, about 400 of the barrels were stored outside on the face of the dock awaiting shipment (Aps. 126) (Libelant's Ex. 8). This piling of barrels on the dock commenced "about the last week of packing" (Aps. 128), and Wakefield contended that the barrels were covered with tarpaulins or salt sacks and kept wet (Aps. 127).

This witness also testified that these barrels would be in the shade, which does not coincide with the physical evidence of Libelant's Ex. 8, being a photograph of the face of the plant bathed in full sunshine.

The witness also testified he was present on the dock when the DENALI arrived and during the loading of the barrels of herring (Aps. 128).

On cross-examination further facts were developed as follows: These herring were a mild (or Scotch) cure, as distinguished from a heavy (or Norwegian) cure. Mild cured herring "has to be kept fairly cool" for the milder the cure the more delicate and perishable are the herring (Aps. 142). This lot of barrels of herring had a brine strength

of about 85% as cured. The original cure, which is effective in the first ten days after packing, is a more or less fixed condition which is not increased by adding heavier brine later (Aps. 144). In repacking or refilling the barrels about 10 days after the original packing, about half the brine is drawn off to let the herring settle more solidly in the barrel, and additional herring are added to fill the barrel; the top is then put on and they are ready for shipment (Aps. 145). The barrels are then stored on their sides in the warehouse and out on the dock until the vessel arrives for loading. Those stored inside are "right up against the wall inside the door" (Aps. 151). The barrels are not inspected again after repacking (Aps. 147). Shipments are not made in less than carload lots by appellee. The packing is irregular, according to available supply of fish, and the repacking is also done at irregular times (Aps. 154). The witness thought that the 225 barrels packed on July 24 and the 102 barrels packed on July 25 were repacked about August 4th or 5th. (These herring at the time of shipment were almost three weeks old, had not been inspected during that time, and had been subjected to outside atmospheric temperatures).

As to the barrels stored out on the dock, the witness, having said on direct examination that the face of the dock was cool and out of the sun, stated

on cross-examination his reason for covering these barrels with salt sacks, "that the sun might come out and be sufficiently warm to affect the herring" (Aps. 156). In answer to this question:

"The sun does affect the herring, does it?"

Wakefield answered:

"Well, if it is hot enough it might. It would draw the oil. It will draw the oil on them if it is very hot." (Aps. 156).

(This was exactly the damage to the herring found upon their discharge from the vessel (Aps. 207)).

An interesting and very material fact is shown by the weather report submitted by appellee in answer to respondent's Interrogatory No. 17 (Aps. 67). Under the heading "Precipitation" in the right-hand column the total precipitation for August, 1946 at Kodiak is shown as -2.26 departure from normal, thus indicating only about 50% of normal rainfall for that month. It must be conceded that August, 1946, was a dry month at this locality and this may well have had a direct bearing on the condition of the barrels of herring allowed to stand in the open plant for from two to four weeks before shipment.

In testifying to what was customarily done with the barrels of herring after arrival in Seattle, the witness stated that whether they were placed in cold storage or not depended upon the weather;

that "when it is cold, rainy weather it isn't necessary to store herring in cold storage"; that if the weather suddenly gets warm it is "put in cold storage" (Aps. 163). The witness testified further that he had always shipped barrels of herring "in the ordinary hold of the ship" and not in cold storage (Aps. 164). However, shipment from Seattle east to New York is in refrigerated railroad cars (Aps. 64).

Upon the question of good order and condition at the time of shipment, testimony by the appellee's witness Kniseley, the chemist who inspected the barrels the day after discharge from the vessel, has a direct bearing.

His inspection pertained to the 971 barrels discharged from No. 3 lower hold. He testified as follows (Aps. 207):

"Q. What was the condition of the fish that you saw?

A. Well, this lot was in varied conditions—some barrels bad and some not so bad.

Q. What was the condition of the ones which you have designated as bad?

A. There was a layer of clear oil on top of the barrels. The barrels were actually warm to the touch and the fish were warm to the touch; when you examined the fish there was a definite odor and the flesh of the fish was soft and there was certain sloughing of scales — every indication that they had been injured by *elevated temperature.*"

After testifying that he took temperatures in the center of the worst barrel and found a temperature of 77° Fahrenheit, and that having picked out 10 or 12 of the worst barrels, he found temperatures in them ranging between 70° and 77°, but that only one barrel was as high as 77° (Aps. 227), he further testified as follows:

“Q. (By Mr. [Claude] Wakefield) Can you tell us, Mr. Kniseley, your opinion as to the amount of temperature and the lengths of time being subjected to that temperature which would be required for a barrel of herring, properly cured, to go to pieces and become soft, such as you found in the herring in question?

A. I would estimate that it would require about 5 days at 77°.

* * * * *

Q. Going back to the same question which you answered (About 5 days at 77°, would that answer require any qualification depending upon the degree of cure that the herring had been given?

A. Yes, I believe so.” (Aps. 214)

As to the lot of 387 barrels discharged after the strike on September 25, 1946, from No. 4 lower hold, the witness testified as follows (Aps. 224):

“Q. With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they compare with those that you examined on September 5th?

A. The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

A. Yes."

Judging from the condition of the herring in the worst barrels, it was Mr. Kniseley's opinion that the condition resulted from "elevated temperature" (Aps. 207) and that this meant any kind of atmospheric temperature, whether natural or artificial (Aps. 225).

The spoilage was not at all uniform among the 971 barrels discharged from No. 3 hold. Some were of fair merchantable quality and others were completely spoiled. The 387 barrels discharged from No. 4 hold after the strike were in more uniform condition.

In the nature of things appellant could not produce any direct evidence of bad or improper condition at the time of shipment. However, some material evidence bearing on this subject was offered by appellant as follows:

Mr. Byrnes, Chief Officer of the DENALI, testified that when the ship arrived at Port Wakefield the barrels of herring piled on the dock "were uncovered and dry" (Aps. 285), and that at that particular time (August 23, 1946) "the weather was unusually warm for Alaska. That is, it was warm weather" (Aps. 286). Mr. Teichroew, the Purser on the DENALI, testified that it was his job to

check the cargo, count the barrels, etc.; that there were about 400 barrels stored out on the face of the dock; and that these 400 barrels were in the sunshine, were uncovered, and dry and warm to the touch (Aps. 309). He also testified that customarily barrels of herring stored outside are covered and kept wet; that they are usually on end and have water standing in the tops of the barrels (Aps. 310); and that all of the barrels loaded at Port Wakefield were piled on their sides, several tiers high, including those inside the large open door in the front of the herring plant. The barrels inside were not as dry as those outside, but they did not have any water on them (Aps. 311).

Mr. Wakefield, who was present on the dock at Port Wakefield when the DENALI arrived and all during the loading of the barrels of herring, did not rebut any of this testimony, although he was present throughout the trial. The evidence of the dry and warm condition of the "about 400 barrels" of herring out on the dock and in the sun when the DENALI arrived, is not controverted.

In answer to appellee's attempt to show good order and condition by merely producing evidence that these barrels were packed in the usual and customary manner, the following points established by the evidence indicate the weakness of that proof, if it be proof at all:

(a) All of the barrels of herring were 13 to 30 days old at the time of shipment and had been stored in the open plant without refrigeration or cooling.

(b) About 400 barrels were out on the open dock in warm weather for at least 5 days, and were warm and dry when the DENALI arrived. The radiant heat of the sun will quickly damage mild cured herring.

(c) Temperature affects the herring. The barrels must be kept cool.

(d) August 1946 at Kodiak was warm and dry, there being only 50% of normal rainfall.

(e) These herring were mild-cured, in only 85% brine solution. The milder the cure the more perishable the product.

(f) The damage was not uniform, there being about 400 barrels in No. 3 lower hold discharged on September 4 which were very bad and worthless, coinciding roughly with the "about 400 barrels" piled on the dock and warm and dry when the DENALI arrived at Port Wakefield, and loaded into No. 3 lower hold.

(g) The 387 barrels discharged from No. 4 lower hold three weeks later than those in No. 3 lower hold, because of the strike, were not as bad as the worst barrels in No. 3 lower hold, but were not as good as the best discharged from No. 3 lower hold.

The lower court in its opinion gave full weight to the testimony of the witness Wakefield as to the usual and customary method of packing barrels of mild cured salt herring, and that such method was followed as to the 1358 barrels in question, and concluded, "that there was no testimony to contradict that testimony that the salt herring contained in these barrels and the subject of this litigation was the same kind of merchantable salt herring which this libellant had produced at the same saltery and shipped in other shipments at other times." (Aps. 453)

Based entirely upon the foregoing, the lower court concluded:

"Therefore, it seems to me that the court must accept as true the testimony adduced by witness Wakefield as proof of the fact that this herring was when it was received on board the ship at Port Wakefield, Alaska, as a matter of fact in apparent good order and condition." (Aps. 453)

(2) *The Law* — "*Good Order and Condition*" —
Concealed Damage.

Damage to the contents of sealed barrels of herring is concealed damage, and the bill of lading recital of receipt by the ship in "apparent good order and condition" does not relieve the shipper of the burden of proving actual good order and con-

dition. Furthermore, this burden of proof cannot rest upon mere inference or speculation.

Among many cases of like sort, the decision of this court in *Albers Bros. Milling Co. v. Hauptman*, 95 F. (2d) 286 (C. A., 9) is in point. That case involved a shipment of corn in bulk, which appeared sound but was found to be defective in that "the corn's interior content of moisture, acidity and rancidity made it not in good order and condition for the voyage in question." In commenting with approval upon the opinion of Judge August Hand in *The Niel Maersk*, 91 F. (2d) 932 (C. A., 2), Judge Denman stated:

" * * *. That decision holds that the principles of *Clark v. Barnwell*, supra, must be applied to the claims of the shipper of the fish meal and that he is required to show that the fish meal itself was in good order and condition for the contemplated voyage, and that the shipper did not escape from or discharge that obligation because the vessel's bills of lading stated apparent good order and condition."

To the same effect are the following cases:

Vernard v. Hudson, 28 Fed. Cas. 1162, Case No. 16,921 (C. C. D. Mass., Story, J.);

The Dondo, 287 F. 239 (S. D. N. Y.);

Pan - American Hide Co. v. Nippon Yusen Kaisha, 13 F. (2d) 871 (S. D. N. Y.);

Monnier v. United States, 16 F. (2d) 812 (E. D. N. Y.);

Bronstein Bros. v. Societa Anonima, etc., 25 F. (2d) 122 (E. D. N. Y.);

The American Tobacco Co. v. S. S. Katingo Hadjipatera, 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948).

The *Albers Bros. Milling Co.* case, above quoted from, has been followed and cited with approval in the following cases:

The Chester Valley, 110 F. (2d) 594 (C. C. A., 5);

Thomas Roberts & Co. v. Calmar S. S. Corp., 59 F. Supp. 203 (E. D. Penn.);

The Ciano, 69 F. Supp. 35 (E. D. Penn.);

The Ensley City, 71 F. Supp. 444 (D. C. Md.).

(3) *Appellee's Burden of Proof.*

Testimony of the proper, usual and customary method of processing, and that it was carried out with respect to the cargo in question, is not sufficient to sustain the burden of proof of good order and condition at time of shipping. This is particularly true where the cargo is perishable and other circumstances are shown, such as, in this case, that there was no inspection at or reasonably near the time of loading; that the processed herring were 13 to 30 days old when shipped; that about 400 barrels were and had been for some days stored on the open dock and were dry and warm when loaded; and that the extent of decay and putrescence varied in wide degree when the fish were examined after discharge.

In *Bronstein Bros. & Co. v. Societa Anonima, etc.*, 25 F. (2d) 122 (E. D. N. Y.), the shipment was of cases of straw hats packed in good order and condition at the factory at Signa, Italy. The court said:

"The proof that the hats were packed in good condition at Signa does not prove that they were in the same condition when delivered to the ship; no witness having been called to show that the damage did not occur while in the possession of the land carrier."

In *Pan-American Hide Co. v. Nippon Yusen Kaisha*, 13 F. (2d) 871 (S. D. N. Y.), Judge Learned Hand dealt with a claim for damage to salt hides, due to decay. He considered many collateral facts bearing upon the question of good order and condition at the time of shipment, indicating the possibilities of damage prior to shipment, and illustrating why the shipper had not sustained the burden of proof. The court's view of this burden, and the evidence necessary to carry it, is well illustrated in the following excerpt:

"On the other hand, it is easy enough to see how the hides might have in fact been damaged before delivery. Take the transit from the slaughterhouses to Rio, a matter of some eight days; DeBrito's estimate is better than Schwab's. This was in part in uncovered cars under an equatorial sun. On delivery at Rio to the warehouses, DeBrito did not examine the hides; Schwab did, but at most not over one-seventh of the whole consignment. It seems to me not impossible that decay might have already set in. Again, in the Belgian warehouse the hides were not turned, as apparently they

should have been. We can tell nothing certain of the pickling there. On the whole, it seems to me as possible, to put it as strongly for the libelant as I can, that the decay took place before the goods were delivered as afterwards. In short, the libelant has not carried its burden, and this would be enough to decide the case."

The California, 4 Fed. Cas. 1058, Case No. 2,314 (D. C. Ore.), involved shipment of five cases of merchandise, and claim that one case was short several items of its contents upon delivery at destination. The claimants offered testimony as to the original packing of the case; that it contained all of the items; that it was taken by truck from the store to the dock and delivered to the vessel. However, the court observed:

"Admitting that the goods were in the case when it left Levi's—which is not beyond doubt—and that they were taken out and the case nailed up again between that place and the wharf, at Portland, there is just as much reason to believe that the embezzlement or robbery took place while the case was on the truck, and before it was delivered to the ship, as afterwards.

"To say the least the evidence leaves it in doubt whether the goods were delivered to the ship or not. The burden of proof as to the delivery being upon the libellants, they cannot recover unless this fact is established with reasonable certainty. * * *."

Vernard v. Hudson, 28 Fed. Cas. 1162, Case No. 16,921 (C. C. Mass., Story, J.), involved damage to thirty hogsheads of bacon shipped on board the

schooner ROLLA from New Orleans to Boston. Issue arose as to whether damage resulted to these hogsheads while on board the vessel, and this in turn involved the question of proof of good order and condition when shipped. The court said:

“ * * *. How can the master be presumed to agree, that the goods are shipped in good order and condition, when he is utterly ignorant what they are, and what is their nature, and what is the state, in which they are? It is true, that the bill of lading states that the contents are bacon; but the master does not admit the fact to be so. He says he knows not the contents of the hogsheads, and therefore he can speak only to the external character of the hogsheads, which might be properly fit for one description of goods, and not for another. The evidence shows that these were western hams, which came from Cincinnati to New Orleans. When they came, how long they had been at New Orleans, and what was their condition, when shipped at New Orleans for Boston, are facts not proved by any clear and determinate evidence. That they were in very good order when shipped at Cincinnati is proved; but it is quite consistent with this fact, that, before they were put on board of the Rolla, they may have suffered all the deterioration and leakage, which were found to exist at Boston. Indeed, the evidence of the persons in Boston, who received them for smoking at Boston, is that they were in as good condition as the average of other shipments of western hams coming to Boston by the way of New Orleans. What I put the case upon in respect to damage is, that the evidence goes no further than this, that there might have been a probable damage from the goods being brought on deck, not that in this case there positively was such a damage. Now,

under all the circumstances, my mind is left in great doubt on the point; and such a doubt alone is sufficient, under such circumstances, to repel the claim."

In our present case the barrels of herring were not inspected at time of shipment, nor at any other proximate time. The 225 barrels of herring packed on July 24, 1946, and the 102 barrels packed on July 25, were repacked about August 4th or 5th, 1946, and were not again looked at. Other barrels packed at later dates were repacked at a later time and closer to the shipment. However, the last 53 barrels in this shipment were packed on August 10, 1946 (Aps. 118). It is admitted that the processing of the herring was a mild cure and they were perishable, and it was necessary to keep the barrels cool. If, as the appellee's witness Kniseley testified, the worst damaged barrel showing a temperature of 77° would spoil to the extent found on inspection within five days at that temperature, and if the 10 or 12 worst barrels examined by him ranged in temperature from 70° to 77° with only one barrel as high as 77°, it may reasonably be questioned whether the elevated temperature did not in fact exist when the barrels were put aboard the vessel, or in any event, whether the condition of "warming up" had not progressed sufficiently at that time so that proper ordinary stowage merely permitted a progressive condition to culminate during the

twelve days the barrels were on board the vessel.

This conclusion is strengthened by the fact that the 971 barrels in No. 3 lower hold outturned in greatly varying conditions. Captain Perry, appellee's surveyor, testified (Aps. 249, et seq.) that of the total of 1358 barrels, 632 barrels were unfit for human consumption. Of this total of 632 barrels, 354 barrels came from No. 3 lower hold and 278 barrels came from No. 4 lower hold, after the strike. The balance of the shipment, consisting of 726 barrels, was in fair condition and the barrels were sold. Of this 726 barrels sold, 596 barrels were sold for 75% of full market price and the balance of 130 barrels at about $\frac{1}{3}$ of full market price (Aps. 139).

It is a very material fact that 354 barrels from No. 3 lower hold were unfit, as this figure corresponds closely with the "about 400 barrels" stored on the face of the dock when the DENALI arrived at Port Wakefield, which were warm and dry and were first loaded into the ship in No. 3 lower hold. On the other hand, there was a considerably higher percentage of barrels spoiled in No. 4 lower hold (278 out of a total of 387) and these were aboard the ship for an additional 21 days due to the strike. From No. 3 lower hold there were 617 barrels in good condition sufficient to be sold and of this total about 500 barrels brought 75% of the full market value (Aps. 137). Of the 109 barrels sold

from No. 4 lower hold, 100 barrels were good enough to sell for 75% of full market value (Aps. 139).

If as appellee contends and the lower court found, all of the barrels of herring were in good, sound condition when delivered to the vessel and were subjected to a temperature of 80° in No. 3 and No. 4 lower holds during the voyage, the damage on outturn would most certainly have been uniform or in any event a great deal more uniform than proved to be the case upon inspection at destination.

There is, therefore, a definite correlation between outturn condition and the age and condition of the barrels at the time of loading to the ship which is more eloquent in explanation of the cause of damage than the speculation of the trial court premised only upon the testimony of customary processing.

The recent case of *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera*, 1949 A. M. C. 49, 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948) involved damage to bales of tobacco and testimony of the libelant as to inspection and proper preparation of the tobacco for shipment. The court did not give weight to such testimony as it did not necessarily apply to proper preparation of the tobacco for the voyage in contemplation, and there was no proof of the moisture content of the shipment. The court said:

“ * * *. Here there is voluminous testimony

by tobacco men on the scene as to inspection and proper preparation of most of the tobacco shipped including the Cavalla belonging to Brown and Williamson and the Volos lots. It appears that Greek tobacco prepared for shipment is handled similarly by all shippers to the United States, and that the tobacco here involved was handled in the customary manner. There was no proof offered, however, of the moisture content of any shipment, and the moisture content of tobacco plays a significant role in the self-heating or fermentation of baled tobacco. In this respect the hazards of shipment resemble those of sardine meal, the spoilage of which has often been the subject of limitation [litigation]. Compare *The Niel Maersk* (S. D. N. Y.), 1936 A. M. C. 1434, 18 F. Supp. 824, reversed (2CCA), 1937 A. M. C. 975, 91 F. (2d) 932, cert. den. (1937), 302 U. S. 753, 1937 A. M. C. 1646, with *The Nichiyo Maru*, (D. Md.), 1936 A. M. C. 639, 14 F. Supp. 727, affirmed (4CCA), 1937 A. M. C. 642, 89 F. (2d) 539; *The Willfaro* (N. D. Cal.), 1925 A. M. C. 998, 9 F. (2d) 940."

We submit that appellee's evidence of customary preparation in any event raises no more than an inference of good condition, and that an inference does not rise to the dignity of proof unless it explains *the known facts* better than any other inference to be drawn from the evidence.

It may quite as readily be inferred from the evidence that the fish were not all in good condition when taken aboard the vessel. The evidence of prior like shipments in the same holds and of the successful carriage of other perishables, and that they

were considered proper holds for the carriage of perishable goods, including herring, between Seattle and Alaskan ports, and that the holds were cool on the occasions they were entered during the voyage in question (Libelant's Ex. 16), affords a proper basis for inferring that the fish in No. 3 hold, being spoiled in varying degrees upon outturn, were in varying degrees of bad order when shipped.

In *New York Life Ins. Co. v. McNeely*, 79 P. (2d) 948 (Ariz.), quoted with approval by Dean Wigmore (1 Evidence (3d ed.), 438), the principle is stated with regard to civil cases:

“(I)t is sufficient, if the ultimate fact is to be determined by an inference from facts which are established by direct evidence, that it be more probable than any other inference which could be drawn from the facts thus proven.” (p. 954).

B. Second Assignment of Error Relied Upon.

“3. That the Court erred in making and entering Finding of Fact IX in respect of the following findings:

(a) That shipment was not delivered by respondent to libelant in like good order and condition as when received by respondent;

(b) That shipment was damaged, destroyed or deteriorated by reason of exposure to excessive heat in lower holds No. 3 and No. 4 during the voyage in question and before discharge from the vessel;

(c) That shipment was exposed to excessive

heat or any undue heat while on board respondent's Steamship DENALI;

(d) That respondent was negligent in any respect concerning the loading, stowage, care, custody or discharge of the shipment in question;

(e) That shipment was damaged at all while being carried on board respondent's Steamship DENALI;

(f) That there were no conditions nor circumstances shown by the evidence excusing nor relieving respondent from liability to libellant." (Aps. 86)

Finding of Fact IX attacked by the foregoing assignment of error, is as follows:

"That thereafter Respondent loaded all the aforesaid merchandise aboard the steamship 'DENALI' and the vessel having on board said merchandise sailed from the port of shipment and subsequently arrived at the port of Seattle, Washington, on September 4, 1946, still having the said merchandise aboard, but not in like good order and condition as when delivered to Respondent, but damaged, destroyed and a portion thereof rendered wholly valueless; that the sole, direct and proximate cause of such damage and deterioration of said cargo was Respondent's exposure of the same to excessive heat in Lower holds 3 and 4, while in the custody of Respondent during the voyage and/or before discharge; that in so exposing the said cargo and shipment of libellant to heat, respondent was guilty of negligence in the loading, handling, stowage, carriage, keeping, custody, care and discharge thereof; that there was no excuse for such negligence, nor were there any conditions nor circumstances excusing nor re-

lieving respondent from liability for the damage caused by such negligence." (Aps. 78)

The gravamen of appellant's contention has to do with the court's finding that there was excessive heat in No. 3 and No. 4 lower holds during the voyage in question. The evidence does not support such a finding on the basis of all the uncontroverted evidence in the case, nor is such a finding justified as an inference from any evidence in the case.

It is also appellant's contention that there is no evidence in the case establishing that the barrels of herring were damaged at all while in appellant's custody, and that on this issue appellee had the burden of proof, which it did not sustain.

However, as it is appellee's sole contention in this case that damage resulted from excessive heat in No. 3 and No. 4 lower holds and the lower court found such excessive heat, and that it was the " * * * sole, direct and proximate cause of such damage * * * " (Aps. 78), it is not necessary to deal with any issue except that of excessive heat.

(1) *No Evidence of "Excessive Heat"*

The only evidence in the case even remotely bearing upon excessive heat in No. 3 lower hold (which does not apply to No. 4 lower hold) is the testimony of appellee's witness Kniseley that on the day after the discharge of the 971 barrels of herring from

No. 3 lower hold, he and Captain Perry went into that hold and obtained a temperature reading on his thermometer of 80° Fahrenheit (Aps. 208). The witness Perry stated that the thermometer read 79° Fahrenheit. This was done at some time after three o'clock on the afternoon of September 5, 1946 (Aps. 253). The barrels had been discharged from this hold beginning about 9:00 o'clock in the evening of September 4 and ending about 1:00 o'clock the following morning (Aps. 324). In this connection the lower court found that the barrels had been discharged fifteen hours prior to the time this temperature reading was obtained (Aps. 455).

However, these appellee's witnesses (Kniseley and Perry) admit that at the time the temperature was taken the DENALI was and had been shut down by the strike early on the morning of September 5 and that the hatch covers were on and covered with tarpaulins (Aps. 212, 267).

The cause of the temperature in No. 3 lower hold of 79 or 80 degrees Fahrenheit on the late afternoon of September 5, 1946, was the complete shutting down of the vessel when the entire crew left because of the strike, which became effective at 8:00 A. M., September 5, 1946. Mr. Felton, the Port Engineer for Alaska Steamship Company, General Agent for appellant, testified that he was present on the morning of September 5 on board the

DENALI and that the ship was completely shut down by 10:30 A. M. (Aps. 331). He testified that in shutting down the ship the condenser, stop valves on the boilers, sea valves and overboard valves are all shut off and closed; that the light plant is shut off, and that this closes down "all forced ventilation, the blowers, fans and all forced draft equipment in the engine room"; that on-deck gear and booms are secured and hatch covers put on, and finally " * * * the last duties of the engine room on deck is to close the water-tight doors or the doors and ports that would let any air or water into the ship—to protect it. That was done on the DENALI before the crew left." (Aps. 329-330).

The effect of shutting down the vessel as described by this witness is to cause the holds and the entire ship to heat up considerably until it has had time to cool off naturally without the aid of ventilation, fans, blowers, etc. Mr. Felton testified (Aps. 333):

"Q. (By Mr. Wakefield) We will get to that next. I just want you now to explain what effect the shutting down has on the heat within the ship and then the reasons why?

A. It warms up the whole ship considerably, especially in the engine room, shaft alleys and so forth due to all the ventilating fans, blowers, forced draft blowers for the boilers being shut down. The heat is still there and there is nothing to carry it away due to the fact that the ship is all secured. All of the equipment down there

still has the heat in it and it takes hours for it to cool down. It has nothing to carry the heat out of the engine room, the fire rooms, shaft alleys and so forth.

* * * * *

Q. Did you have occasion, Mr. Felton, to actually go down on board the DENALI on the afternoon of September 5th?

A. I did.

Q. About what time were you down there?

A. Between 3:00 and 4:00 o'clock in the afternoon.

Q. Did you go down into Number 3 hold at that time?

A. Yes.

Q. Will you tell us what the condition of Number 3 hold was at that time with respect to being warm?

A. The air was close, and seemed unusually warm.

THE COURT: On what date was that?

THE WITNESS: The afternoon of the 5th.

THE COURT: About 3:00 o'clock, did you say?

THE WITNESS: Between 3:00 and 4:00 o'clock. I don't exactly remember the time." (Aps. 333-334).

This evidence was not controverted by appellee nor is there reason to doubt its credibility. It would seem obvious that such shutting down or closing up of a steamship would result in greatly increased heat for such period of time as was required to cool

the engine room, etc., naturally and without the aid of ventilation fans, etc. The source of heat is, of course, from the boilers, condensers, steam lines, etc. Anyone who has been in the engine room and boiler room of a ship, even with full ventilation, knows that it is hot and that it would remain hot for a time after being closed up and that such heat would be transmitted to other parts of the vessel when ventilation and forced draft equipment was shut down, as it was on this occasion.

Certainly no finding of excessive heat in No. 3 lower hold during the voyage can be based upon the fact that the temperature in this hold was found to be 79 or 80 degrees some fifteen hours after discharge of the barrels of herring and five to six hours after the vessel had been shut down tight due to the strike. No temperature was taken at all in No. 4 lower hold and the finding of excessive heat in this hold is not based upon any evidence whatever.

We next consider the question of *the possibility* of any excessive heat during the voyage, as suggested by the evidence.

There is no evidence in the record of actual temperatures taken in the holds during the voyage or at the time of discharge of the barrels of herring, but there is direct evidence that there was no excessive heat in these holds and also that there was

no source from which such heat could be transmitted to these holds when the vessel was operating.

As the evidence is extensive on this issue and is not controverted by appellee's evidence, we will summarize it, as follows:

No. 3 lower hold is aft of the engine room, but the forward bulkhead is not the engine room bulkhead, as there is a companionway between No. 3 lower hold and the engine room, which connects the two shaft alleys (Resp. Ex. A-4, Aps. 291, 397). No. 4 lower hold is aft of No. 3 lower hold and runs to the stern of the vessel. The DENALI being a twin screw vessel, there are two propeller shafts, each of which is enclosed in a shaft alley, and the two shaft alleys run through the No. 3 and No. 4 lower holds with ordinary cargo space in between. The shaft alley consists of a steel housing which covers the propeller shaft and extends up from the floor of the hold about 7 feet (Aps. 363). The space is ample inside the shaft alley for a man to walk in inspecting the propeller shafts and bearings. This steel housing is made of $\frac{5}{8}$ inch steel (Aps. 338). At the end of each shaft alley there is an escape tunnel and hatch leading to the top deck, which is left open (Aps. 415). There are no steam pipes or other possible sources of heat in either No. 3 or No. 4 lower holds (Aps. 292, 327, 397, 415). There is a steam pipe in each shaft alley and a return con-

densation line, and these are insulated (Aps. 413). These steam lines are located near the top of the shaft alley housing inside and "just underneath the round of the shaft alley" (Aps. 414). There is no heat generated within the shaft alley itself from the turning of the propeller shafts. The bearings are cool (Aps. 339). The No. 3 and No. 4 lower holds are below the water line and the sea water, being 40 to 45 degrees, would cool the steel hull and have the effect of cooling the holds (Aps. 335). There were no conditions in either hold which could produce any artificial heat beyond normal atmospheric temperature (Aps. 396-397). There was no cargo in either hold, other than the barrels of herring, which could produce heat—only cases of canned salmon (Resp. Ex. A-2; Aps. 363, 382). Nothing occurred on the voyage on board the vessel which could account for any heat in these holds (Aps. 340, 373). Any heat in the shaft alleys is carried away by the open escape hatch at the after end (Aps. 415).

Mr. Burns, Chief Officer of the DENALI, testified that No. 3 and No. 4 lower holds were dry and clean and in proper condition when the barrels of herring were loaded (Aps. 293); that these holds are not warm holds (Aps. 295); that nothing occurred on the voyage to account for possible heat; that barrels of herring and other semi-perishables

are customarily carried in these holds (Aps. 369, 397) (Libellant's Ex. 16). Mr. Burns was in No. 3 and No. 4 lower holds several times within four days after the loading at Port Wakefield and was climbing up on and over the shaft alleys in connection with the loading of cases of canned salmon. He testified everything was normal and that as to the shaft alleys "it was neither ice cold nor warm" (Aps. 385). There was no cargo stowed on top of the barrels of herring in No. 3 hold (Aps. 382).

Mr. Teichroew, the Purser, testified he was in No. 3 and No. 4 lower holds on the voyage from Port Wakefield to Seattle and that they were "normally cool" (Aps. 313).

Mr. Sharp, the checker who handled the discharge of the 971 barrels of herring from No. 3 lower hold, commencing about 9:00 P. M., September 4, 1946, testified as follows (Aps. 324):

"Q. (By Mr. Wakefield) Did you feel any of the barrels with your hands or otherwise?

A. I did, when I looked at them. The fish was cooked the way they expressed themselves. That is, the men that refused to buy them on account of the condition they were in—a buyer from Canada as I remember it made the remark that the fish was cooked, that all it was fit for was fertilizer. I wondered how they got cooked and I figured if they were the barrels would have to be hot. I felt some of them.

Q. Were the barrels hot or warm?

A. They weren't cold. They would be just

what you would call the chill taken off of them. If I put my hands in water, of the same temperature I would say it was tepid, that was all. It was certainly not warm enough for cooking to suit my taste."

Mr. Hanson, Superintendent of Alaska Terminal & Stevedoring Company, and prior to that time Chief Stevedore for Alaska Steamship Company since 1936, whose job is to get cargo into and out of the vessels and to determine where to put cargo (Aps. 344), testified:

1. Neither No. 3 or No. 4 lower holds are warm holds, and they are proper places to stow barrels of salt herring (Aps. 346).

2. These lower holds are proper places to stow semi-perishable cargo such as citrus fruits, eggs, lard, onions, tomatoes, potatoes, candy, etc. (Aps. 349).

3. There was no cargo stowed in either No. 3 or No. 4 holds on the voyage in question which would produce any heat (Aps. 351).

Mr. Damalin, Longshoreman Foreman, with experience since 1910, and familiar with Alaska Steamship Company vessels, including the DENALI, for the past fifteen years, testified he was familiar with No. 3 and No. 4 lower holds on the DENALI, and in fact, acted as foreman in discharging the barrels of herring in question in this case from No. 4 lower hold on September 25, 1946

(Aps. 357); that he had always found No. 3 and No. 4 lower holds to be cool (Aps. 359); that he was actually down in the holds, standing on and climbing over the shaft alleys, and "I have never found them warm yet" (Aps. 362); and that he has done this many times as soon as the vessel arrives and the discharging commences (Aps. 364).

While objection was sustained by the court to admission of appellant's evidence of the carriage of barrels of salt herring and of other semi-perishable cargoes in No. 3 and No. 4 lower holds without damage or loss on many other voyages of the vessel (Aps. 295 to 306), appellee nevertheless offered and the court received in evidence the survey report of James Gow made on behalf of appellant at the time of the loss, as Libelant's Ex. 16 (Aps. 408), and cross-examined the witness at great length concerning other shipments of herring and other cargoes successfully carried in No. 3 and No. 4 lower holds, and appellee must, therefore, be held to have waived the objection. The said survey report (Libelant's Ex. 16) was offered and received in full and the above-mentioned evidence is therefore before the court. Libelant's Exhibit 16, being a competent survey report made at the time of the loss and before claim or suit, and offered in evidence by appellee, is entitled to great weight. Mr.

James Gow is well qualified in such matters (Aps. 385 to 388).

(2) *Lower Court Erred in Finding "Excessive Heat"*

In the lower court's decision it was stated (Aps. 455):

"There was some oral testimony to the effect that while the unloading of the herring was in progress some heat about the shaft alleys was noticeable, although there was some oral testimony to the contrary."

Appellant contends that this statement is wrong. A review of the evidence fails to disclose any such testimony. Appellee is invited to point out to this court any such evidence in the case.

Upon all of the foregoing evidence the lower court nevertheless found: "that at and before time of discharge such temperature in the hold was excessive * * *." (Aps. 455). This is a finding of a material fact upon which appellee had the burden of proof, and such burden was not sustained, nor is there any evidence from which a legal inference of such fact arises. The finding is based upon mere speculation and conjecture, or what the Trial Judge may have thought about it, unaided by evidence or reasonable inference from evidence and against the great weight of the only credible evidence on the point.

Nowhere in the testimony of appellee, the court's

opinion or the findings of fact does it appear what is meant or found by "excessive heat" nor what is "excessive heat" as applied to a barrel of mild cured salt herring. The court's finding of "excessive heat" may mean that 40 degrees, 50 degrees, or even 60 or 70 degrees was excessive, or it may mean that because the temperature in No. 3 lower hold was 79 or 80 degrees, some 5 to 6 hours after the vessel had been shut down tight by the strike, that this was the temperature in the hold during the voyage and that such was excessive.

Mr. Kniseley, appellee's expert witness, stated that a barrel of mild cured salt herring subjected to a temperature of 65 to 70 degrees would not spoil, to the extent found in the herring in question after discharge, for a period of 30 to 45 days (Aps. 222). This shipment as to No. 3 lower hold was in the vessel only 12 days—August 24 to September 4. On this basis we would have to conclude that if the temperature in the hold was as high as 70 degrees, this would not be excessive and therefore the Trial Judge must have in some manner found that the temperature in No. 3 and No. 4 lower holds was above 70 degrees during the entire voyage and that such hypothetical temperature was excessive for ordinary stowage on a voyage in the summertime, and also that appellant was negligent in accepting the shipment for stowage in No. 3 and No. 4 lower

holds because it knew that the temperature would be above 70 degrees and also knew that such temperature would cause the herring to spoil.

On the other hand, appellee, in answer to Interrogatory 16 propounded by appellant, stated that a temperature of 70° for one week would spoil the herring. This interrogatory and answer thereto was offered and admittted in evidence and is as follows (Aps. 278):

“Question: If salt herring in barrels has been damaged and rendered unfit for food as a result of heat encountered on the trip from Port Wakefield to Seattle by vessel, state your opinion as to what degree of heat and for how long a time it would be required to do such damage?

“Answer: Libelant believes that the subjection of salt herring in barrels to heat up to 70 degrees for one week would damage it and render it unfit for food.”

If the shipment as tendered to the vessel for a 12-day voyage in the summer months and for ordinary stowage would spoil in seven days of temperature of only 70° Fahrenheit, it was not in proper condition for such a voyage, within the knowledge of the shipper.

All of this finding about “excessive” temperature in both lower holds is certainly speculation and not in any way supported by the evidence. If it had appeared that something had gone wrong, such as the breaking of a steam line or the failure of equipment or the presence of other hot cargo, etc., any

one of which could have produced greater heat than is normal in these holds and such heat as would be excessive heat for the carriage of barrels of mild-cured salt herring even in ordinary stowage, appellant would be put to it to prove absence of negligence or that such heat was not excessive; but there is no such situation presented here. All we have in the record of this case is a situation of ordinary stowage in a hold frequently and customarily used for stowage of barrels of herring and other semi-perishable cargo carried on a normal and usual voyage of the *DENALI*, unattended by any factors accounting for abnormal heat or other improper conditions in the holds, and the outturn of the barrels of herring at destination damaged due to "elevated temperature," which elevated temperature may have resulted from any number of sources, including the inherent vice of the cargo itself.

(3) *Inherent Vice — Burden of Proof of Damage Aboard Ship.*

The issue of "inherent vice" is raised in appellant's answer, and was at all times before the court (Aps. 10).

In the *Dondo*, 287 Fed. 239 (S. D. N. Y., Learned Hand), damage was due to the contents of bales of lambskins outturned wet. In addition to announcing the rule of concealed damage and holding that

the shipper has the burden of proof of showing good order and condition when shipped, the court also said:

“The shipper must show damage while in the carrier’s hands and it is only an excuse e. g. an exception in the bill of lading that the carrier must allege and prove.”

In *Pan-American Hide Co. v. Nippon Yusen Kaisha*, 13 F. (2d) 871 (S. D. N. Y.), Judge Hand considered another case similar to the foregoing, involving damage to salt hides by water. This was not a case of concealed damage, and delivery in good order was established prima facie by the bill of lading recital. Delivery in damaged condition was shown. However, the court said:

“I agree that the recital in the bill of lading and the delivery in bad order make out a prima facie case for the libelant. However, a prima facie case is one thing, and the burden of proof is another. *The libelant has that burden on the issue whether the goods were damaged while in the carrier’s custody.* Taking all the evidence in the case, I am not convinced that it did.”
(Italics ours)

A further statement in the opinion is material in our present case. The damage to the hides was spoilage or decay. The court said:

“Decay resulting merely from the condition of the goods unaffected by any contributing factor arising on shipboard is not chargeable against the ship even without exception. The brig *Collemberg*, 1 Black, 170, 17 L. Ed. 89; *The Freedom*, L. R. 3 P. C. 594, 600 (semble).”

Improper stowage was considered and found in the cases of the *Niel Maersk*, 91 F. (2d) 932 (C. C. A., 2), and *Albers Bros. Milling Co. v. Hauptman*, 95 F. (2d) 286 (C. C. A., 9), in conjunction with a finding of failure of the shipper to bear the burden of proof of good order and condition at time of shipment, and the carrier was nevertheless not held liable.

In the *Niel Maersk* (supra), the damage was to fish meal in sacks due to excess moisture and improper "stowage in ill-ventilated and hot portions of the ship." Nevertheless, even with proof and a finding of such a sufficient cause to account for the damage, the court refused to allow any recovery because of lack of proof of the condition of the shipment when delivered to the carrier.

"Without proof of such condition there would be no basis for calculating any damages caused by the carrier. The condition of the goods when placed on board was not within its knowledge and it should not have the burden of separating damages arising from causes prior to shipment from damages due to negligent stowage."

In the *Albers Bros. Milling Co.* case (supra) the lower court had found that the stowage of corn might have resulted in some damage to it, or that there might have been "heightened damage from defect in stowage." Nevertheless, on the basis of failure of proof of good condition at time of shipment, the shipper did not prevail in this court.

“It being affirmatively shown that the corn was not in good order and condition for the voyage, and that it presented the likelihood of damage if stowed in the customary method for the trade, the burden of segregating this damage from any heightened damage from defect in stowage would fall upon the shipper. The carrier cannot be called upon to segregate the damage caused by the act of the shipper in giving to the carrier a commodity which had the internal and nonapparent vice proved to exist in this corn.”

This doctrine is now well established, and was recently applied in a case similar to the present one. *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera*, et al., 81 F. Supp. 438 (S. D. N. Y., Nov. 23, 1948). In this case the cargo was bales of tobacco stowed in No. 3 lower hold and 'tween deck. The damage was from heat and resulting fire from spontaneous combustion. The libelant contended and the court found that the stowage was improper. The two lots of tobacco which heated and were damaged were described as the “Volos” and “Cavalla” tobaccos.

The court said:

“ * * *. Other than Volos and Cavalla, no tobaccos self-heated, no matter where stowed. It must be inferred that the Cavalla and Volos lots were, at the very least, more susceptible to heating than all the other tobacco. Since it has already been found that the over-stowage of No. 3 tweendeck materially reduced the ventilation of No. 3 hold, the conclusion is warranted that a combination of improper stowage

and susceptibility to heating of the Cavalla tobacco caused the fire in No. 3 hold."

Due to the nature of the cargo and its susceptibility to internal defects, the defense of "inherent vice" was raised and considered by the court. It was held that in such cases the burden of disproving that the damage resulted from inherent defects rested with the shipper. In reviewing the law leading to this conclusion the court said:

"The Supreme Court has said that the carrier by sea who delivers in bad condition cargo that he had received in good condition has the burden of establishing every exception to his general liability; *Schnell v. The Vallescura*, 293 U. S. 296, 1934 A. M. C. 1573. The weight of this burden was moderated when certiorari was denied, 1937, 302 U. S. 753, 1937 A. M. C. 1646, to review *The Niel Maersk* (2CCA, 1937), 1937 A.M.C. 975, 91 F. (2d) 932, in which it was held that the shipper must affirmatively establish the good condition at time of shipment of goods damaged by heating, where the carrier claimed the cause to have been inherent vice. This would suggest that whenever cargo damage could have been caused by internal defects, the shipper must disprove such defects in order to recover even if the carrier's failure to exercise due diligence in stowing or caring for the cargo may have caused or contributed to the damage; *The Niel Maersk*, supra; Contra: *The Nichiyo Maru* (4 CCA), 1937 A. M. C. 642, 89 F. (2d) 539. (In other cases in which both the carrier's fault and an excepted cause produced the damage, the carrier is liable for all the damage unless it can establish what proportion was due to the excepted cause; *Schnell v. The Vallescura*, supra). Although the ultimate burden

of proof differs as between a common carrier and a mere bailee, the initial duty of explaining the cause of damage is normally placed upon both bailee and carrier because, being in possession of the goods, they have the best and frequently the only knowledge of what actually took place. *Commercial Molasses Corp. v. N. Y. Tank Barge Corp.*, 314 U. S. 104, 1941 A. M. C. 1697. *But this rationale is hardly applicable to inherent vice or its obverse, the good condition of the goods at the time of shipment.* On the contrary, it is the shipper who has access to that information, and therefore, should be compelled to tender it." (Italics ours)

Under the foregoing facts and law applicable to this case, appellant contends as follows:

I.

The evidence does not prove that the barrels of herring were damaged while in appellant's possession.

II.

If the herring was damaged while in its possession, such damage resulted from the inherent vice of the cargo, i.e., its insufficient condition at the time of loading to successfully carry to destination in the ordinary stowage contracted for by appellee.

III.

The stowage was the usual and customary stowage afforded such cargo and was proper ordinary stowage under all the circumstances.

IV.

To the extent the stowage may have enhanced

the inherent vice of the barrels of herring due to warm atmospheric temperatures, calm air or other natural conditions as distinguished from negligent commission or omission of the carrier, the shipper must be held to have assumed such risk inherent in ordinary stowage on a twelve-day voyage during the summer months, as an accommodation between the perishable nature of cargo and the available shipping facilities from appellee's plant and other economic factors.

(4) *Inherent Vice is Relative*

Bache v. Silver Line, 110 F. (2d) 60 (C.C.A., 2)

The contention last stated above is supported on broad principles in *Bache v. Silver Line*, 110 F. (2d) 60 (C.C.A., 2), dealing with a practical legal *conflict between inherent vice and alleged improper stowage*. The cited case shows a definite trend of law towards realism in dealing with this type of case. The shipment there was of bales of sheet rubber from Java to New York. The bales were held together by metal bands and, as a result of the manner of stowing in the ship by piling many bales on top of each other, some of the bales became badly twisted and crushed and were discharged in such condition that they could not be readily handled in processing, for which damages were claimed. The shipper contended in effect that the vessel knew

of the manner in which the bales were wrapped and held together, and knew that the weight of many tiers would crush and twist the bales, and therefore that the stowage should have been in a manner to avoid this result. The vessel contended that the bales were improperly packaged for such a voyage, that the bales had to be stowed in tiers to utilize the space of the vessel, and that customary stowage was afforded. These contentions presented a conflict of interests to which the law must "always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods" (P. 62).

By analogy, and considering barrels of mild cured salt herring in lieu of bales of rubber, and the various cargo factors applicable to mild cured herring, such as (1) the degree of cure afforded by the processor (the milder the cure the more perishable the commodity), (2) the length of time the barrels are held at the processing plant after packing, (3) the length of the voyage, (4) the time of year, and (5) that only ordinary stowage is available and contracted for, the language and theory of the cited case is peculiarly applicable here. The shipper knows these cargo factors, the carrier knows that the shipper knows of the usual and available type of stowage on board the ship. The carrier afforded lower hold stowage, which was known to be the cool-

est cargo space (there were actually barrels of herring in Nos. 1, 3 and 4 lower holds). No heat-producing cargo, such as fish meal, was placed in the same compartment with the herring. All of these factors at once call for application of the "accommodation" mentioned by the court in the cited case. Obviously, the shipper—processor of the herring—must create a product sufficiently cured and sufficiently fresh and stable to withstand the transport it knows the herring will be subjected to on a voyage from Kodiak to Seattle in the summer months in ordinary stowage. Obviously the vessel must afford the best practical ordinary stowage available under all the circumstances.

The following language of the court in the *Bache v. Silver Line* case (*supra*), when applied to the factors involved in shipping barrels of mild cured salt herring, is in point and establishes appellant's freedom from liability in our present case as in the cited case:

"All this is quite true; and it is also true that if goods, as they are wrapped or cased, are not fitted to endure the ordinary hazards of the voyage, the ship is not liable. §1304(2) (n), Title 46 U. S. Code, 46 U. S. C. A. §1304(2) (n). These two dictrines clash, if each is applied with unsparing logic. On the one hand there are very few goods, cased or not cased, that some degree of care will not protect from the perils of a sea voyage; and on the other there are few that cannot be packed or cased so that they

will survive the roughest handling. Here, for example, the bales could have been stowed in two or three tiers, and perhaps would not have been crushed enough to count, though even that is an assumption. Also the libellants could have cased them, as is sometimes done, and they could have been safely stowed in seventeen tiers, as in part they were. To stow the goods as the libellants insist was required, would impose a loss upon the ship; to case them, a loss upon the shipper. Moreover, it is as legitimate an answer for the ship to make to the shipper, that if he delivers the bales, knowing that the customary stowage may damage them, he cannot insist that the stowage is bad; as it is for the shipper to make to the ship that if the ship accepts them uncased, it is bad stowage not to limit the tiers. The greater part of the law is made up of the compromise of such conflicts of interest; and this is no exception. In the carriage of goods the trade must always come to some accommodation between ideal perfection of stowage and entire disregard of the safety of the goods; when it has done so, that becomes the standard for that kind of goods. Ordinarily it will not certainly prevent any damage, and both sides know that the goods will be somewhat exposed; *but if the shipper wishes more, he must provide for it particularly.*"

It would seem that our present case is a proper one for the application of the principles established in *Bache v. Silver Line*, supra.

The position of appellant carrier in this controversy involves these factors—barrels of salt herring are a frequent and usual semi-perishable cargo in the Alaska trade—the DENALI has successfully carried many barrels of herring in its lower holds,

including No. 3 and No. 4 lower holds—barrels of herring are tendered to the vessel at the processing plant without any possible inspection of the sealed barrels and in the absence of advices to the contrary, the carrier must assume that the herring is in proper condition to be carried as usual under the circumstances known by the shipper, i.e., the length of the voyage, that it is being made in the summer months, and that no refrigeration is afforded.

The position of the appellee shipper, on the other hand, is this—it is known from years of experience that the herring must be sufficiently cured to withstand the usual waiting period and necessary voyage from Kodiak to Seattle in ordinary stowage—the shipper has shipped many barrels of herring on the S.S. DENALI and understands it is contracting for such stowage, in the lower holds—it is known that shipments made in the summer months may be subjected to warm atmospheric conditions and that the voyage will last so many days, during which time the barrels of herring will be subjected to all usual and normal conditions which the vessel will reasonably encounter—the trade requires a mild (Scotch) cure, as distinguished from a heavy (Norwegian) cure salt herring, and it is sought to give as mild a cure as possible and still have the herring remain stable until it reaches the consumer.

Being thus confronted with such conflicting in-

terests, the *Bache v. Silver Line* case (supra) holds that the law must reach an accommodation between these interests, which is another way of saying—"that which is fair to both parties."

Under the evidence in this case and all reasonable inferences therefrom the damage here is clearly the result of inherent vice either directly on the basis of actual bad order and condition at the time of shipment or indirectly because the herring were in insufficient good condition to withstand the transportation in ordinary stowage; the herring did not meet "the standard for that kind of goods" required of the shipper under the doctrine of *Bache v. Silver Line* (supra), and he must bear the loss.

Under the heading "*Inherent Vice and Insufficient Packing*" in Knauth on Ocean Bills of Lading—1947, page 173, is found the following applicable statement:

"These two subjects may conveniently be discussed together. In each case the logical dilemma is the same. On the one hand it is well settled from ancient times that the ocean carrier is bound to know the characteristics of the cargo which it accepts, and to do whatever is reasonably necessary to provide a ship and stowage, including dunnage, which will result in the cargo being carried safely and delivered at destination in the same good order and condition as when received at the place of shipment. On the other hand, the ocean carrier and ship are not responsible for the inherent character of the article offered, nor for the method

of its wrapping by or on behalf of the persons who tender the goods for shipment. When these two doctrines clash, the trade must come to an accommodation between ideal perfection of stowage and entire disregard of the safety of the goods. The accommodation so arrived at by custom becomes a standard which the Court will read into the contract of carriage; it thus becomes the measure of the carrier's liability. When customary stowage results in damage to cargo of which the cargo owners complain, the burden of proof of the unreasonableness of the customary stowage is on the cargo interests. *The Silversandal* (*Bache v. Silver Line, Ltd.*), 1940 A. M. C. 731 (2CCA)."

C. *Third Assignment of Error Relied Upon.*

"15. That the Court erred in failing and refusing to find that the damage to the portion of the shipment stowed in No. 4 lower hold (to-wit, 183 barrels — medium; 94 half barrels — large; and 110 quarter barrels) resulted solely and proximately from the unavoidable delay in discharge of said hold due to the strike effective between September 5, 1946, and September 25, 1946, for which respondent is not liable within the bill of lading exceptions and Section 4(2) (j) of the Carriage of Goods by Sea Act, 1936 (46 U. S. C. 1304)." (Aps. 89)

The issue of the "strike exception" as to 387 barrels of herring stowed in No. 4 lower hold, transportation of which was contracted for in the bill of lading incorporating the United States Carriage of Goods by Sea Act, 1936 (46 U. S. C. §1304) (Aps. 47), was raised affirmatively in appellant's answer to the amended libel (Aps. 33). The trial court did not deal with this issue in its decision (Aps. 69)

or in the findings of fact and conclusions of law (Aps. 76), and this was plainly error.

Based upon the evidence heretofore discussed in this brief, it is uncontroverted that the 387 barrels of herring stowed in No. 4 lower hold were not and could not have been discharged from the ship until September 25, 1946, because of a general maritime strike at the port of Seattle, effective September 5, 1946, when the crews of all vessels, including the DENALI, walked off the vessels. This portion of the shipment, therefore, remained on board the vessel for three weeks longer than the portion of the shipment discharged from No. 3 lower hold on September 4, 1946, just prior to the strike. There is no evidence of any examination or inspection of this portion of the shipment upon arrival at Seattle on September 4, and therefore no evidence of its condition upon arrival at destination and prior to the strike.

This portion of the shipment was inspected after discharge from the vessel on September 26. Of 387 barrels discharged from No. 4 lower hold, 278 barrels were found unfit and 109 were usable (Aps. 255). The condition was more uniform than the lot of 971 barrels examined on September 5.

“Q. (By Mr. Wakefield): With respect to the barrels that you examined on September 26th, the balance of the shipment, how did they com-

pare with those that you examined on September 5th?

"A. (By Mr. Kniseley, appellee's expert witness): The condition was more nearly uniform. I didn't notice so many that were extremely bad. But they were all I believe worse than the best ones that I examined on September 5th.

"Q. Did that same condition that you explained exist with respect to the oil and the softness of the fish?

"A. Yes." (Aps. 224)

The evidence further shows that the barrels stowed in No. 4 lower hold were the last ones packed and were therefore the freshest (Aps. 146). The No. 3 lower hold was first loaded with the "about 400 barrels" from the dock and then from inside the plant, so that when 971 barrels had filled No. 3 lower hold and loading commenced in No. 4 lower hold, the newest processed barrels were then loaded (Aps. 151, 159).

The No. 3 lower hold shipment had 354 unfit barrels corresponding roughly to the number piled on the face of the dock and the balance were in varying conditions, many of which brought 75% of full market value, but as those from No. 4 lower hold were necessarily held aboard the vessel for three additional weeks but were fresher or newer fish, they held up longer and nevertheless 278 barrels of this lot spoiled due to delay in discharge.

None of the evidence as to heat in the hold, heat

in the barrels of herring or other facts developed as to possible heat with respect to No. 3 lower hold and barrels of herring discharged from this hold, applies to No. 4 lower hold. In addition, No. 4 lower hold, due to its location at the stern of the vessel, may well be assumed to have been somewhat cooler (Resp. Ex. A-4). No temperatures were taken in No. 4 lower hold nor of the barrels of herring discharged from this hold.

On this basis no justification is possible for finding excess heat in No. 4 lower hold, and the unavoidable delay in discharging for three weeks on account of the general maritime strike must inevitably have caused or contributed to the damaged condition of the barrels of herring therefrom. This falls within the "strike exception," and appellant is not liable for any damage to herring in No. 4 lower hold.

This court had occasion to pass on the strike exception in the *Mawi*, 113 F. (2d) 1018 (C.C.A., 9). That case involved spoilage of perishable cargo loaded on the vessel the day the strike was called. The cargo spoiled before the strike terminated and the vessel was relieved from liability under the bill of lading exception against strike. The court said:

" * * *. When appellee proved that the loss arose from an excepted cause (strike), it discharged the burden resting immediately upon it. *The Malcolm Baxter*, supra; *United States*

v. Los Angeles Soap Co., 9 Cir., 1936 A. M. C. 850, 83 F. (2d) 875."

Appellant contends that with respect to damage to the 387 barrels of herring stowed in No. 4 lower hold, the exception against "strike" is a further ground for denial of any recovery by appellee with respect to that portion of the shipment.

CONCLUSION

Appellant's contention on this appeal may be summarized as follows:

1. *Good Order and Condition—Burden of Proof.*

A. The cargo being perishable and concealed within barrels, there is no presumption or prima facie case of good order and condition at time of shipment arising from the bill of lading recital of receipt in "apparent good order and condition," and appellee has the burden of proving actual good order and condition.

B. Appellee has not sustained such burden of proof either by direct evidence or by reasonable inference from all the proven facts, and the lower court's finding to the contrary is based upon speculation and conjecture.

C. With respect to such a perishable commodity as herring, proof of usual and customary processing 13 to 30 days prior to shipment, without proof of

actual degree of curing or of actual inspection of their condition at or proximate to the time of shipment, is not sufficient to sustain the burden of proof cast upon appellee.

D. No legal proof of good order and condition at time of shipment is established by inference from evidence of usual processing when the facts proven at the trial are fully as consistent (and we think much more consistent) with a contrary inference. We refer to such proven facts as the following:

(1) Mild cured salt herring is a perishable commodity, which must be kept cool.

(2) The herring in question were packed and processed between July 24 and August 10, 1946, and were held in ordinary warehouse storage by appellee until shipped August 23, 1946.

(3) About 400 barrels were piled on the open dock at the plant for five or six days before the vessel arrived and at the time of loading were dry and warm.

(4) August 1946 was an exceptionally dry month in the vicinity of Port Wakefield.

(5) The lower hold stowage afforded the barrels was usual stowage for this commodity.

(6) The voyage was usual and normal, without fortuitous occurrence.

(7) Appellee's expert witness Kniseley testified that barrels of herring in proper condition would

not spoil for thirty to forty-five days in temperatures of 65° to 70°.

(8) The 971 barrels outturned from No. 3 lower hold on September 4, 1946, were in varying condition—356 were unfit for human consumption—496 were good enough to sell for 75% of full market price.

(9) The 387 barrels outturned from No. 4 lower hold on September 25, 1946, having remained in the vessel three weeks longer than those in No. 3 lower hold due to the strike, were in more uniform condition—none so bad and none so good—278 were unfit for human consumption and 109 sufficient to be sold.

Other collateral facts developed in this brief warrant the same inference of insufficient condition for the voyage undertaken.

2. *Excessive Heat*

The lower court found that the damage in this case was due to "excessive heat" in No. 3 and No. 4 lower holds. There is no proof or reasonable inference from facts proven that there was any abnormal heat whatsoever in No. 3 and No. 4 lower holds on the voyage in question or that the barrels of herring were damaged at all from any cause while on board the vessel, except the inherent vice of the cargo.

A. Appellee's evidence of alleged excessive heat amounts only to temperature taken in No. 3 lower hold fifteen hours after discharge and five to six hours after the vessel had been closed down on account of strike; thermometer readings of internal temperature in twelve of the worst barrels, ranging from 70° to 77° some fifteen hours after their discharge from the ship; and testimony of an insulated steam pipe in each of the two shaft alleys.

B. Explaining these matters and militating against the court's conclusions from the foregoing is uncontroverted evidence to the following effect:

(1) Closing down the ship, as because of strike, raises the temperature of the holds, due to shutting down ventilation, fans, blowers, hatches, water-tight doors, etc., and temperatures taken in a hold five to six hours afterwards are no criteria of temperatures under operating conditions—it would be much warmer when shut down, at least until the dead ship had had time to cool off naturally.

(2) Neither No. 3 nor No. 4 lower holds are warm holds.

(a) They are below the water line.

(b) There are no steam pipes in either hold.

(c) No heat comes from the shaft alleys—the bearings are cool, the steam pipe inside is insulated, and the alleys themselves are ventilated through an escape hatch.

(d) No. 3 lower hold is separated and insulated from the engine room by two bulkheads accommodating a four-foot wide companionway connecting the two shaft alleys.

(e) Semi-perishables, including mild cured herring, are successfully carried in these holds.

(3) There was no other cargo stowed in either hold on the voyage in question which could produce heat—only canned salmon.

(4) The holds were not warm when inspected by the Chief Officer when loading canned salmon in these holds as long as five days after loading the barrels of herring at Port Wakefield.

(5) Nothing occurred on the voyage in question of a fortuitous nature or otherwise which could account for heat—everything was normal.

(6) Opinions of persons qualified to know (Surveyor Gow, Chief Mate Burns, Purser Teicheroew and Stevedores Hanson and Damalin) are to the effect that these are not warm holds and that they are proper for stowage of barrels of mild cured herring.

(7) The outside of the barrels at the time of discharge at Seattle after a twelve-day voyage felt only "tepid."

C. In any event the so-called "excessive heat" as applied to mild cured herring shipped at the request of appellee in ordinary stowage on a twelve-

day voyage in the summertime is relative and the evidence furnishes no criteria of the degree of heat intended to be found by the trial court as "excessive."

(1) Mr. Kniseley, appellee's witness, estimated that proper mild cured herring would spoil in thirty to forty-five days in temperatures ranging between 65° and 70°.

(2) It is stimated that the degree of cure put into the herring varies and that the milder the cure the more perishable the herring. This was a mild cure in only 85% solution.

(3) Appellant has no knowledge of the condition or degree of cure or how perishable any particular lot of herring may be and only contracts to give ordinary and customary stowage.

(4) Appellee's president was present when the barrels were loaded into No. 3 and No. 4 lower holds, as he had been on previous occasions on this same vessel.

D. None of appellee's so-called direct evidence has any bearing upon temperatures in No. 4 hold at any time.

3. Inherent Vice as Related to Order and Condition at Time of Shipment.

Inherent vice with respect to barrels of mild cured herring can relate to actual bad condition at time

of loading or, even though they be sound when shipped, to insufficient condition of the fish to remain sound under the circumstances of the stowage and voyage undertaken and contracted for.

A. In the absence of advice to appellant to the contrary, and there was none here, appellant need only furnish the usual and customary stowage afforded barrels of mild cured herring in the usual condition for carriage on the voyage undertaken.

B. That damage resulted or was enhanced on board the vessel does not render appellant liable if appellant furnished the usual and customary stowage afforded such shipments as established by the trade and proven sufficient and proper (*Bache v. Silver Line*, supra).

C. Whether temperature is "excessive" in a hold must necessarily be premised upon other proven factors, such as the degree of cure and age of, and prior temperatures experienced by, the cargo at the time of loading, and where there is no evidence of *actual* condition of the cargo when delivered to the vessel and the vessel affords usual and customary stowage and there is no proof of negligence or fortuitous occurrence, and it appears there was nothing more than a normal voyage, the cargo owner cannot recover merely because his shipment is discharged in a deteriorated condition of an inherent nature, such as decay and spoilage.

(1) The damage to the herring (without reference to the extent of cure) is said to have resulted from "elevated temperature," which is from any kind of heat, natural or artificial. On the premise that the milder the cure the more perishable are the herring, the temperature, whatever it may be in degrees, may be excessive or not depending upon many factors pertaining to the condition of the herring when shipped.

(2) In ordinary stowage in No. 3 and/or No. 4 lower holds it can be assumed for the purpose of illustration that the temperature may normally vary from 65° to 70° (or other similar range of degrees) depending upon the outside temperature during a summer voyage. This may be excessive for barrels of herring which have been held at the processing plant for fifteen to thirty days, or for barrels which have stood on the open dock for five or six days, or for barrels which have a milder cure than usual, but would not be excessive for other barrels in a different condition, i.e., more firmly cured, fresher, or subjected to lower temperature prior to loading.

(3) If as the evidence shows a given fresh barrel of herring with a particular degree of cure and re-packed in a heavy brine will remain stable only for a certain time at a fixed temperature, it is at once apparent that any finding of excessive temperature

is only warranted when all of the other necessary facts are known. Our closest estimate of the normal temperature of a barrel of salt herring is "in the neighborhood of 60 or 70" (Aps. 221). If as appellee's witness Kniseley testified a barrel of mild cured salt herring will remain stable for thirty to forty-five days subjected to interior temperature of 65° to 70°, admittedly a rough estimate, then it may well be that some or all of the barrels in question had been subjected to such temperatures at the processing plant for from fifteen to thirty days at time of loading, and that those 400 piled on the open dock had been subjected to even higher temperature for five to six days, and therefore upon loading the remaining time left for the barrels to remain stable had been so shortened that after a twelve-day normal summer voyage they were spoiled. If we add the possibility of the cure being a little milder than usual, or the repacking brine less strong than usual, this possibility is even more certain. This inference is strengthened by the actual condition on outturn from No. 3 lower hold—356 spoiled and almost 500 good enough to be sold for 75% of market. In No. 4 lower hold (none of the barrels having been on the open dock and all being fresher at time of loading) none of the barrels were in as bad condition as the 356 spoiled barrels from No. 3 lower hold, even

though they had remained in the ship for an additional twenty-one days.

The foregoing illustrates clearly the unfairness of the lower court's unequivocal findings of "good order and condition," and of "excessive heat" in No. 3 and No. 4 lower holds, and proves that many inferences and conjectures can reasonably result from the facts proven and that these are as consistent, if not more consistent, with a finding of proper and customary care and stowage as with any finding of excessive heat in the holds.

4. *The Strike*

The damage to 387 barrels in No. 4 lower hold, insofar as it occurred on board the vessel, was inevitably and immeasurably enhanced, if not solely caused, by delay in discharge for twenty-one days due to a general maritime strike and the inability of appellant to discharge the cargo. This situation is covered by the "strike exception" in the bill of lading and appellant is thereby relieved from liability in any event for damage to the herring discharged from No. 4 lower hold. The extent of this damage can be readily computed from the evidence. The lower court makes no mention of the strike or the defense interposed.

WHEREFORE, appellant contends—

1. The lower court erred in finding that appellee

sustained the burden of proof and/or that in fact the barrels of herring were in "good order and condition" at the time of shipment.

2. The lower court erred in finding that the contents of the barrels of herring were damaged while on board appellant's vessel.

3. The lower court erred in finding "excessive heat" in No. 3 and No. 4 lower holds, and that this was the "sole and proximate cause of the damage."

4. The lower court erred in failing to find that the damage to 387 barrels of herring in No. 4 lower hold, insofar as it resulted on board the vessel, was excused under the "strike exception" of the bill of lading.

Respectfully submitted,

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In The United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
APEX FISH COMPANY, a corporation, *Appellee.*

UPON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

**BRIEF OF APPELLEE, APEX FISH COMPANY,
A CORPORATION**

FILED

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**BRIEF OF APPELLEE, APEX FISH COMPANY,
A CORPORATION**

I.

STATEMENT OF THE CASE

A. FACTS

On August 23, 1946, the SS "DENALI," which was then being operated by Appellant, arrived at Appellee's saltery at Port Wakefield, Alaska, and proceeded to load a shipment of salt herring packed in barrels. There were 110 quarter barrels of medium herring, 119 half barrels of large herring and 1,129 half barrels of medium herring. Loading was accomplished by the ship's crew and no one on behalf of Appellee visited the ship's hold nor was apprised of where the herring was being stowed, save the fact was apparent that the herring was being loaded into No. 3 and No. 4 holds. Loading was completed and the vessel sailed at 8:12 a.m. August 24, 1946.

At 6:40 p.m. on September 4, 1946, the "DENALI"

arrived at the Bell Street Terminal in Seattle, Washington (Aps. 374). Discharge of the cargo in suit commenced on 8:30 p.m. on that day and was suspended when only 971 half barrels were discharged. Libellant's inspector, Peter A. Wahl, was waiting on the dock and immediately opened and inspected the barrels (Ex. 12, Aps. 183). He noted the contents were spoiled and at once notified the ship (Libellant's Interrogatory No. 16 and Respondent's Answer thereto). He then opened all of the 971 barrels and concluded that contents of all of them had been damaged by stowage in a warm place (Ex. 12).

Appellee's agent, James Farrell & Co., was notified of the damage and immediately engaged Mr. J. M. Kniseley, a chemical engineer employed by I. F. Laucks & Co., and Captain L. C. Perry, a marine surveyor of many years experience, to inspect the 971 barrels. No inspection of the portion of the shipment in No. 4 hold was made immediately for the reason that the same was not discharged until September 25, 1946.

Captain Perry arrived at Bell Street Dock at 10:00 a.m. on September 5, 1946, and entered upon his inspection with Mr. Wahl. Mr. Kniseley arrived in the afternoon and together they proceeded to take various temperatures at about 3:00 p.m. Barrels of libellant's spoiled herring were selected at random and their internal temperatures recorded. Mr. Kniseley used a 15-inch thermometer which was thrust into the center of the barrels. Temperatures ranged from 70°F. to 77°F. in these barrels (Aps. 207). The barrels had been placed in an unheated covered dock

warehouse at the time of discharge and had been off the ship about 19 hours at the time of taking the temperatures (Aps. 210, 211). The temperature of the dock at the same time was 68°F. (Aps. 208). An unspoiled barrel of herring from another shipment stored on the dock was recorded as having a temperature of 65°F. The temperature in Seattle from the time of the arrival of the cargo to the time of these readings at no time exceeded 69°F. (Ex. 10).

Mr. Kniseley and Captain Perry then proceeded aboard the "DENALI" and entered the No. 3 lower hold. The temperature at the point where the herring had been stowed in No. 3 lower hold was 80°F. (Aps. 208). It was discovered that the 971 barrels had been stowed between the two shaft alleys of the "DENALI" which are rounded on top and about seven feet high running parallel fore and aft. These shaft alleys were entered by these witnesses and found to contain a number of steam pipes along their inboard sides which were not insulated at the joints. Some of these pipes contain live steam and others contain hot water (Aps. 442, 446). Included among these pipes are an inch and one-half live steam line, a one-half inch return line (Aps. 336, 337) at three inch steam line and four inch return line and additional steam pipes and returns varying from three-quarters of an inch to one inch in diameter (Aps. 339). Live steam was even yet leaking from some of the joints, although the ship had been completely shut down about five hours before (Aps. 442). There is no question but that these shaft alleys generate heat (Aps. 333).

The 971 barrels varied in condition, but not a sin-

gle barrel escaped damage. A layer of clear oil lay on top of the brine and the fish were soft. The worst ones had decayed and gave off an offensive odor. The degree of spoilage was found to be in direct proportion to the degree of heat recorded in each barrel, the warmer barrels being the most severely damaged (Aps. 209). Of this lot 354 were adjudged unfit for any use except reduction for oil (Aps. 256). The remaining 617 half barrels were placed in storage in the hope they might have some value.

The 387 barrels of herring in No. 4 lower hold were also stowed between the shaft alleys and in addition were overstowed with cartons of canned salmon. When outturned they were immediately inspected and found to be similarly damaged, but on the whole not quite as badly as those in No. 3 lower hold. The heated engine room lies just forward of No. 3 hold separated by an alley way from the forward bulkhead of No. 3. No. 4 is aft of No. 3 and has the same shaft alleys running through the lower portion thereof. A shipment of salt herring in No. 1 hold also detained during the maritime strike outturned completely undamaged. There are no steam lines or shaft alleys in No. 1 hold.

Of this lot of 387 barrels 278 were adjudged wholly unfit for human consumption and 109 were considered as having some possible salvage value (Aps. 255). Every barrel in the shipment was damaged to some extent (Aps. 210, 255, 256). It was clear that the entire shipment had been literally cooked causing the oil to leave the fish and rise to the top of the barrel leaving the flesh of the fish soft and the scales with a tendency to slough (Aps. 324).

Appellant has conceded that Appellee's loss is properly fixed by the decree at \$18,783.92 (Appellant's brief page 6). No purpose would therefore be served by detailing the facts regarding damage, except to note that none of the salvaged cargo was sold nor saleable for any amount in excess of 75% of the going market value and much of it sold for less.

The packing and processing of this herring prior to shipment was all done under the personal supervision of Lee H. Wakefield, Appellee's president. Mr. Wakefield testified that he has been in the business of processing and marketing salt herring in Alaska for a period of 32 years commencing in 1916 (Aps. 103). Until 1931 his duties were primarily supervisory at the salteries and in addition he handled the marketing of the finished product. During this period he also engaged for a time in the salmon canning business. He spent all or a part of each herring season at various herring processing plants during this period and by observation and participation acquired an intimate knowledge of each step in the processing and curing of salt herring.

In 1931 Mr. Wakefield assumed the actual job and responsibility of herring curer at the plant of Apex Fish Company and held this job down to and including the date of the shipment involved herein. As such he participated to a greater or less extent in each step of the process of curing herring. During this time he was likewise in sole charge of marketing appellee's finished product usually through the common brokerage channels. His personal interest in the op-

eration of appellee's plant is clear in view of his ownership of a majority of the capital stock and his position as president of the corporation (Aps. 107).

Part of the business of appellee is the processing and sale of salt herring. Its plant is located on Raspberry Island in the Territory of Alaska. Specifically it is located approximately 30 nautical miles northwest of Kodiak, Alaska, which latter point is at latitude N. $57^{\circ}45'$ longitude W. $152^{\circ}31'$ (Exhibits 4 and 9). Port Wakefield is located within that area of Alaska designated by the United States Department of Commerce Weather Bureau as the "southern division."

Appellee's plant also houses the operation of a reduction plant which produces herring meal and oil. Only the very choicest fish are selected for the salt herring operation, the remainder being shunted into the meal and oil section of the plant.

Herring are brought to the plant daily, weather permitting, in fishing boats. Radio contact is maintained by appellee with the fishing boats and an accurate check made as to the time elapsing between catching of the herring and arrival at the plant (Aps. 116). Herring which have been caught more than ten hours previous to delivery are rejected by the saltery and directed into the meal and oil plant (Aps. 115).

The herring involved in this action were received at the plant from July 24 to August 10, 1946, inclusive (Ex. 7). Mr. Wakefield personally met about half of the fishing boats at the dock during this period and made the primary inspection of the fish (Aps. 122).

The remainder of the boats were met and the fish inspected by the head curer, a man of many years experience. At such inspections all fish containing black feed or which had been caught too long or were unfit for any reason for salting were sent into the meal plant and not processed for salt herring.

Processing of this shipment started immediately upon the fish reaching the saltery. The herring were carried up a conveyor which has an automatic sorting device based on the size of the fish and passed directly to the gibbers, a group of women who perform the duty of removing the pectoral fins, the gills and the main intestine. The gibbers also reject any fish which are too small, too soft or which have been damaged or are in any way unfit for salting and which may have escaped the primary inspection (Aps. 123). Rejected fish are dropped into a hole readily available to each gibber and ultimately pass into the meal plant.

After gibbing and culling the herring were salted, roused and packed in half barrels. When the half barrels were full they were headed, placed on their sides, saturated brine solution poured inside. A bung was inserted in the hole and each barrel placed in the warehouse for curing (Aps. 112).

In curing, the barrels were stored under cover in the plant for a period of seven to twelve days. Curing is completed in seven days, but the average time allowed is ten days. During curing the herring are dehydrated to a certain extent and shrink approximately 20% in bulk (Aps. 113).

After curing and usually about ten days after being originally packed the barrels were opened and re-packed. This is made necessary in order to completely fill the barrels, the contents of each having shrunk about 20% as indicated. Each barrel had the date of original pack indicated on the bottom and re-packing was done in units of one days pack. Contents of some of the barrels were dumped into a tub. The bungs were removed from the remaining barrels as they stood on end, the brine permitted to run out down to the level of the bung hole and the barrel filled to the top with fish from the tub. Each barrel was tested with a salometer and the brine strength made to fall in each barrel within the range of 85% to 90% of saturation. The barrels were then re-headed and stored in the warehouse to await shipment (Aps. 143).

Such re-packing continued right down to the arrival of the "DENALI" on August 23, 1946. A large number of the barrels were opened, inspected, re-packed and re-brined during the last few days preceding the arrival of the "DENALI." Each of the barrels was fully inspected by Mr. Wakefield at the time of re-packing at which time he handled the fish to determine the extent of the cure (Aps. 130). At no time was any spoilage or deterioration of any kind detected in the shipment by appellee and when last seen by appellee the contents of each barrel were firm and in excellent condition.

After final inspection and re-packing the shipment was stored in appellee's wet, cool warehouse to await shipment. The warehouse is covered and has nothing

in it which might generate heat. It is extremely cool because of the use of a great deal of water in the plant and is situated over the water on a dock resting on piling. The warehouse is about twelve feet high and both the warehouse and dock face in a general northeasterly direction (Ex. 8).

Somewhere between three and five days before the arrival of the "DENALI" about 400 barrels of the processed herring were placed on the northeasterly end of the warehouse on the dock. They were tiered three high and piled from the wall of the warehouse up toward the face of the dock on their sides. The pile was covered with salt sacks and tarpaulins and wet down frequently with a hose in order to keep them cool (Aps. 127). Mr. Wakefield personally engaged in wetting the barrels down and did so as dictated by his judgment and experience. Appellee kept in touch with respondent's agent in Kodiak by radio and knew when the "DENALI" was to arrive at Port Wakefield (Aps. 150). During the morning of August 23 the salt sacks and tarpaulins were removed from the 400 barrels. The vessel arrived at 11:58 a.m. on that day.

Mr. Wakefield made weekly trips to Kodiak during the period involved in this action and has been in the area of Port Wakefield for many years. He testified the weather conditions at Port Wakefield and Kodiak are almost identical. There is a United States Weather Station at Kodiak, but none at Port Wakefield.

July, 1946 was cooler and wetter than usual at

Port Wakefield (Ex. 9). The maximum temperature attained during the July portion of processing of this shipment was on July 26 and 27 when 70°F. was attained. These were unusual days as the mean for the month was only 54.2°F. Only one clear day was recorded in July. There were eighteen entirely cloudy days, twelve partly cloudy.

August, 1946, was one of the coolest on record in Alaska, although rainfall was slightly below normal. The maximum temperature attained at Port Wakefield was 66°F. on August 20. The mean for the month was 53.3°F. , a deviation of -1.4°F. below normal. There were no clear days in August; twenty days were entirely cloudy and eleven partly cloudy. There were nineteen days with rainfall in excess of .01 inch.

The shipment involved in this action was one of several during the 1946 season. There was a shipment preceding it in July and several which followed it. The processing of the shipment was identical in all respects with the method followed by Mr. Wakefield for 32 years previous. No losses from heat damage or spoilage of any kind have ever before occurred to Mr. Wakefield in following this procedure.

B. QUESTIONS INVOLVED

An additional question not touched upon by appellant but definitely involved herein is as follows:

1. If the evidence discloses delivery of a cargo of barreled salt herring to a vessel in good order and condition and delivery by the vessel at Port of destination in bad order and condition due to the contents being damaged by excessive heat, is the shipper and owner of the cargo entitled to judgment against the carrier for his damage in the absence of a showing by the carrier that the damage was due to some cause for which the carrier is not liable under applicable law?

This question is raised by the pleadings and has been inherent in the cause by its very nature throughout all of the proceedings. It was recognized by appellant in its affirmative defenses in which it alleged the applicability of the Carriage of Goods by Sea Act, 46 U.S.C.A. 1300 *et seq.* and set out alleged defenses based on inherent defect, quality or vice of the goods shipped aboard, faults or errors in navigation or in the management of the vessel and delay in discharge due to a maritime strike.

II.

ARGUMENT

A. ARGUMENT IN ANSWER TO APPELLANT

1. In General

Appellee desires to divide its argument into two main sections. The first will be addressed to answering the arguments of appellant and the second will be

an argument in support of the judgment. In answering appellant, appellee will divide its argument into the same main headings adopted by appellant.

One thing, however, should be made clear. Appellee has at all times maintained the position that it is entitled to judgment upon proving by a preponderance of the evidence, delivery of the cargo to appellant in good order, arrival of the cargo at destination in bad order, and the extent of appellee's damage. Appellee has further contended that upon proving these ultimate facts the burden fell upon appellant to establish that the loss was one from which appellant is exempted from liability by applicable law.

Appellant has artfully contrived to divert its argument from these basic points. While appellants arguments on the wholly immaterial and divergent points raised in its brief are easily answered and while appellee will undertake to do so, appellee does not thereby wish to give the impression that it has receded from its basic stand as above indicated.

For example, on the matter of arrival at destination in bad order appellee contented itself with showing the condition of the fish on arrival including the temperature thereof; that the extent of damage varied in accordance with the temperature; that the highest temperature recorded in one of its spoiled barrels was 77°F.; that the only possible place such a temperature could have been acquired was aboard the vessel where a temperature of 80°F. was recorded. All of the evidence as to stowage, the degree of temperature and the lapse of time required to spoil the her-ring and other extraneous matters were either brought

on cross-examination of appellee's witnesses or through appellant's witnesses or by appellee on rebuttal. Appellee proved the three ultimate facts of (1) delivery to the carrier in good order, (2) arrival at port of destination in bad order, and (3) the extent of its damage, and in addition proved that the bad order of the fish was caused by excessive external heat.

2. The Evidence—Good Order and Condition

Lee H. Wakefield testified in detail as to the exact manner in which this shipment was processed prior to delivery aboard the "DENALI." His testimony covers the entire period of time from arrival of the fish at the saltery to its being placed aboard the "DENALI." While his testimony details a process which he successfully followed without a single loss from heat damage for thirty-two years it nevertheless clearly appears that this process is the identical one through which this shipment progressed (Aps. 121).

Appellant would make some point of the fact that some of the barrels in this shipment were held at appellee's plant for as long as 30 days. The testimony of Mr. Wakefield established that this had been his usual practice for 32 years, without any loss whatsoever. Such evidence, wholly uncontroverted, is a complete answer to what is no more than a smoke screen innuendo. There is a complete lack of testimony that holding of salt herring at the saltery for 30 days or more will result in damage.

There is in addition no testimony whatsoever to contradict the evidence that the portion of this ship-

ment piled on the dock was covered with tarpaulins and salt sacks and thoroughly wet down at all times. Appellee was notified by wireless of the time when the "DENALI" would arrive at its saltery on August 23 (Aps. 150). The salt sacks and tarpaulins were not removed until shortly before the vessel arrived (Aps. 152).

Ex. 9 shows that .02 of an inch of rain fell in the Port Wakefield area on August 23, and that the maximum temperature attained on that day was 57°F. It is a reasonable inference from these facts that the day was quite cloudy. Even assuming that there may have been intermittent periods of sunshine during the morning, the physical facts negative any possibility of damage to the barrels. They were piled against the wall of the warehouse, which faces northeast. The warehouse is 12 feet high. The sun does not get directly overhead at the latitude of Port Wakefield, but swings in a long low arc from northeast to northwest. The early morning sun might strike the barrels, but during the rest of the day they would of necessity be in the shade. Because of their curved sides, only a small portion of each barrel could ever be exposed to the sun at any given time. They were tiered three high, on their sides, so that only the topmost row would ever be exposed in any event.

These uncontrovertible physical facts overwhelmingly demonstrate the utter impossibility of these barrels picking up sufficient heat at Port Wakefield so that 12 days later they would still register 77°F. inside the barrels. The only place such heat was ever

found to exist in this entire proceeding was in the hold of the "DENALI."

It is quite true that these herring were a mild or Scotch cure, which is not as strong as a Norwegian, or heavy cure, and therefore more perishable. But they were the same strength of cure which Mr. Wakefield had been producing for 32 years without loss.

Appellant suggests that the three week lapse of time between last inspection of some of these barrels may have caused them to spoil. Such an argument assumes that somewhere between three weeks and one day there is a time beyond which such herring should not have been kept at the saltery. Even ignoring the fact that the lapse of time in this case was in all respects normal and had never before caused loss, we come to an uncontrovertible fact which wholly destroys appellant's argument. Every single barrel which went aboard the "DENALI" was damaged. Not one barrel came through unscathed. The cause, therefore, was one which operated uniformly on the entire shipment, and is much more easily explained by the excessive heat of 80°F. registered in the hold of the "DENALI."

The fact of uniform damage to the entire shipment also disposes of appellant's argument to the effect that the sun instead of the heat from the shaft alleys and engine rooms of the "DENALI" might have boiled the oil from the fish. Only about 130 barrels were on the top tiers on the dock. The rest of the shipment was either in lower tiers or under cover. Yet every barrel was injured.

Clearly the sun could not affect the barrels inside the warehouse. The only thing which would affect them would be atmospheric temperature, which never rose above 66°F. and only averaged 53.3°F. in August, 1946, at Port Wakefield.

There is nothing in the evidence to indicate that herring require rainfall to keep them in good condition. The important thing is temperature. Appellant clearly embarks on speculation and conjecture when it states that the fact that August, 1946, had a little less rainfall than usual is a "very material fact." The mean temperature was —1.4°F. below normal at Port Wakefield in August, 1946 (Ex. 9).

It is true that the degree of spoilage was not uniform in all of the barrels. It is not true, however, that any of the barrels were of top merchantable quality. In 1946 herring was very scarce and buyers were eager. Yet none of these barrels could be sold for more than 75% of the going market price.

The reason for lack of uniform spoilage is clearly explained by the witness Kniseley (Aps. 234). The air coming in contact with the hot shaft alleys and engine room bulkhead would pick up heat through the process of convection. Such air would rise until it contacted a cold object, then fall. This tended to create air currents which moved in a haphazard fashion, following the path of least resistance and not operating uniformly on the shipment.

The testimony of Mr. Byrnes, Chief Officer of the "DENALI," and of Mr. Teichroew, the Purser, fall far short of controverting appellee's evidence of good

order and condition. The tendency of such personnel to "stick by the ship" when on the witness stand is well known, and much of their testimony is contrary to the great weight of the evidence as well as the laws of physics. For example, a wooden barrel containing brine could never be "dry (Aps. 234, 235). Capillary attraction would be continually at work transmitting the water to the outside of the barrel, where it would escape to the air by evaporation. The surface of the barrel would always be moist. Again, the conclusion of the witness Byrnes that the weather was "unusually warm for Alaska" is not supported by any temperature reading and is directly contrary to the official findings of the U. S. Weather Bureau.

Again, while Mr. Teichroew contended some of these barrels were "warm to the touch," he did not deem this fact of sufficient importance to make any notation thereof on the Bill of Lading.

The points set out by appellant at page 24 of its brief are answered as follows:

(a) 30 days is a normal time for herring to remain in appellee's plant, without refrigeration. Such procedure has never caused a heat loss in 32 years.

(b) The weather was not "warm" during the period the 400 barrels were piled on the dock (Ex. 9). It averaged only 53.3°F. for the month of August. It was not shown at any place in the evidence that such piling of barrels on a dock will damage herring, nor that the amount of sunlight in these five days could have damaged this herring.

(c) Appellee wholeheartedly agrees that tempera-

ture affects the herring and that the barrels must be kept cool. Appellee kept them cool at all times prior to delivery to the "DENALI."

(d) While August, 1946, had less than normal rainfall, the statement that such month was "warm and dry" is directly contrary to the official opinion of the U. S. Weather Bureau (Ex. 9).

(e) The herring were the same cure which Mr. Wakefield had shipped with Alaska Steamship Company personnel, who were operating the "DENALI" for appellant, for many years. Appellant was bound to know the perishable nature of this cargo and give it proper care.

(f) Admittedly the damage was not uniform. While the "about 400 barrels" may in appellant's opinion coincide with the 354 barrels adjudged unfit for human consumption taken from lower No. 3 hold, it leaves entirely unexplained the 278 barrels likewise unfit for human consumption which came from lower No. 4 hold.

(g) The heat in No. 4 hold was undoubtedly not as intense as in No. 3, as it is farther from the heated engine room. Naturally the damage would not be as bad in No. 4 hold.

3. The Law—"Good Order and Condition"—Concealed Damage.

Appellee concedes that the issuance of a clean Bill of Lading does not ordinarily operate to relieve a shipper of goods in sealed containers of the necessity of proving good order and condition when shipped. However, the cause of damage to this shipment was

excessive heat. One of the things the court is called upon to decide in this proceeding is whether that heat was acquired prior to or during the carriage aboard the "DENALI."

Appellants witness Teichroew, the Purser who signed the Bill of Lading, testified that the barrels were "warm to the touch" when they were being loaded aboard. The conditon this witness says he observed was an *external* one, namely, excessive heat on the outside of the container. Much of appellant's defense is pinned on this shred of testimony. Yet, the witness Teichroew made no mention of this condition on the Bill of Lading.

A clean Bill of Lading has been held to preponderate over testimony of the ship's crew when the damage was externally discernible. In *Stirnimann v. The San Diego*, 148 Fed.(2d) 141, a giant crane arrived in San Francisco with certain of its parts bent, twisted and rusty. Respondent's witnesses testified they observed this condition at the time of loading. In permitting a recovery the court said at page 142:

"There is here no dispute as to the damaged condition of the crane upon arrival at San Francisco. Respondents contend, however, that libelant failed to prove injury during the course of transportation. We cannot agree. Libelant did put the Bill of Lading in evidence; and the statement therein contained of the apparent good condition of the shipment while not conclusive does amount to initial proof of its freedom from open and visible damage prior to transportation."

4. Appellee's Burden of Proof

In this case appellee's evidence has covered every period of time from the receipt of fish at the cannery to delivery aboard the "DENALI." It is true that final inspections of these barrels occurred from August 4th or 5th down to August 23rd when the "DENALI" arrived so that of necessity some of the barrels had not been looked at for some 18 or 19 days. However, some of them had been inspected and found good not later than the day before shipment, and possibly some even on the very day they were shipped. Nevertheless, every single barrel in the shipment was damaged on arrival at port of destination. There can be no question of the good order of those most recently inspected—nevertheless they all outturned bad at Seattle. The inference is compelling that we must look elsewhere than appellee's plant for the cause of the damage.

An outstanding fact which must be borne in mind is that the cause of this damage was excessive heat. The evidence of appellee conclusively establishes that these barrels did not have heat of anything like 77°F. in them when loaded aboard the "DENALI." There is no source of heat in appellee's plant, and the barrels had been subjected to a mean temperature of only 53.3°F. during their storage at the plant. This alone should be sufficient to establish the good order and condition of this shipment.

Rules of law should be and usually are applied in reasonable consonance with the facts and conditions in each case. Appellant suggests by its argument that appellee should have inspected each of these barrels at the time of loading, or suffer the penalty of never

being able to prove the shipment was in good order and condition. However, the opening, dumping, re-filling, re-coopering and recording of the temperature of each of these barrels would impose an unreasonable burden on both shipper and carrier. It is improbable that any vessel would tie up and await the completion of such a procedure as it is wholly impractical and if encountered at each saltery and cannery would greatly lengthen any voyage into Alaskan waters.

It is submitted that the evidence of appellee covers every practical means of showing the good order and condition of this shipment. To hold otherwise would be to completely deny shippers of all goods in sealed containers the right to recover for internal damage occurring to their goods while in the custody of the carrier.

The cases of *Bronstein Bros. & Co. v. Societa Anonima, etc.*, 25 F.(2d) 122 (E.D.N.Y.), *Pan American Hide Co. v. Nippon Yusen Kaisha*, 13 F.(2d) 871 (S.D.N.Y.), *The California*, 4 Fed. Cas. 1058, case No. 2314 (D.C. Ore.), and *Vernard v. Hudson*, 28 Fed. Cas. 1162, case No. 16,921 (C.C.D. Mass., Storey, J.) all differ from the instant case in one significant fact. In each case there is a gap in libellant's testimony. Some period of time existed in each of these cases during which the condition to which the shipment was subjected were left to speculation and conjecture. That is not true in this case. The temperature is shown for each day this shipment was at appellee's saltery—and never did even approach the 77°F. found in the barrels at Seattle. There is no

intervening carrier nor any lapse of time not accounted for in the evidence.

Appellant contends that the evidence of similar shipments carried in these same holds on other voyages affords a proper basis for inferring that these holds were proper for the carriage of this cargo. Such is not the law. In *The Richelieu*, 1931 A.M.C. 721, 48 F.(2d) 497 (C.C.A. 4), action was brought for recovery of damages sustained as the result of an explosion of pitch dust alleged to have been due to negligence. Respondent railroad attempted to escape liability by showing it loaded the pitch in the same manner as coal was ordinarily handled and thereby adhered to a standard of due care. The court said:

“* * * the mere fact that they had loaded coal with the same machinery and with similar open lights without explosion and that they had been assured that pitch would load like coal offers no excuse for the negligence. In loading coal the dust was kept down with the sprinkler system which was not used in loading pitch; and it is a matter of common knowledge that the danger of explosion in a dust cloud is dependent upon its acquiring the proper density and the fact that no explosion resulted in the loading of coal is not conclusive that the methods employed were such as in the exercise of due care should have been used even there. Negligent methods of operation do not always or even generally result in disaster. The inquiry is not whether a method of operation has been used without disastrous results, but whether it is of such a character that danger of injury is reasonably to be apprehended from its use. Where the element of danger is

present successful operation is to be deemed 'fortunate rather than prudent'."

Although not an appellate decision, the *Ensley City*, 71 F. Supp. 444, decided by the United States District Court for the District of Maryland on March 27, 1947, is factually similar to the instant case. Recovery was sought for damage to a cargo of licorice extract stowed in No. 4 'tween decks just aft of the engine room. The cargo was melted by the heat and merged into a solid mass when the heat was reduced. The opinion recites:

"We excluded all of these records because of the obvious probability of there having been such variations in other important factors from voyage to voyage as would materially affect temperatures below decks * * *. Also the proffered temperature records taken on other voyages of this same vessel could not be said to have much, if any, probative weight if other important factors are not precisely known such as the condition of the hatches; the extent to which they may have been open or closed before or at the time the temperatures were taken; and whether the ventilators even though the same in character, number and location were set for operation at the same angle, and whether there were strong or light winds and from what points of the compass."

5. No Evidence of "Excessive Heat".

Appellant seeks to discredit the evidence of 80°F. in the hold of the "DENALI" by showing the effect of shutting down the vessel due to strike. Such evidence is inconclusive. If it be true that shutting down in-

creases the temperature, then a necessary inquiry would be to what extent and over what pre-existing temperature. There is no evidence that the boilers of the "DENALI" had been fired after she tied up at 6:40 p.m. on September 4. There is no reason to believe they were as her only duty was discharge and her winches are electric (Aps. 337). It is just as reasonable to assume that upon docking the fires were extinguished and the temperature in No. 3 hold began to decline. The extent of such decline is left to speculation. The 80°F. temperature may well have been far below the temperature existing in this hold under the conditions obtaining during the voyage.

As to the latter we are wholly uninformed. The evidence does not disclose whether there are any fans or other devices for cooling the hold. Nor does it disclose whether there are ventilators; whether they were open or closed, nor how they were trimmed, nor the direction of prevailing winds during the voyage. For all the record shows the heat from the engine room and the steam pipes in the shaft alleys may well have risen to tremendous heights during this voyage.

For these obvious defects it is apparent that both the evidence of appellant as to the effect of shutting down and the evidence of appellee as to an 80°F. temperature is inconclusive. The evidence of appellant really proves nothing and the evidence of appellee proves only that under the circumstances which then existed a temperature of 80°F. could be and was attained in the hold of the "DENALI." However, the fact that it was attained during the voyage is proved beyond all doubt by the fact that after 19 hours of cool-

ing on the unheated dock at Seattle the cargo was found to contain temperatures of 77°F. This evidence alone is free from doubt or speculation and therein lies the proof of excessive heat.

6. Lower Court Erred in Finding "Excessive Heat".

On all of the evidence in this case the cargo had not been subjected to excessive heat up to the time it was loaded aboard the "DENALI." The temperature to which it had been subjected was below average and the average temperature had caused no damage to similar cargoes for 32 years.

The evidence is clear that the damage to this cargo was caused by excessive heat (Ex. 12, Aps. 207, 259, 447).

No other factor has been mentioned which causes the oil to leave the fish and rise to the top of the barrel and the evidence discloses that this is the only cause thereof (Aps. 259, 260). The only source of such heat in the entire case is the hold of the "DENALI." Under the circumstances the court's finding was justified and no other could properly have been made.

7. Inherent Vice—Burden of Proof of Damage Aboard Ship.

In discussing this question it is well to bear in mind that the cause of damage to this cargo was heat. All of the evidence so indicates and there is none to the contrary. The appellant so concedes when it argues that the bleak Arctic sun produced sufficient heat to last through 13 days and still register 77° in the heart of one of the barrels.

The proof uncontroverted establishes that the herring were packed in brine of a strength 85% to 90% of saturation (Aps. 144). Such a strength is sufficient to keep the fish from spoiling under normal shipping conditions. However, it has nothing to do with boiling the oil from the fish. Only elevated temperature will do this (Aps. 259, 260). Even if the fish spoiled in a solution too weak to preserve them the temperature of the barrel would not rise one whit (Aps. 218, 219). The question of inherent vice therefore becomes irrelevant in this case, it being clear that there was no condition in the barrels which could cause an elevated temperature. The only possible source of such heat is from external application of heat.

In *American Tobacco Co. et al. v. S. S. Katingo Hadjipatera, et al.*, 81 F. Supp. 438, cited by appellant, the court accepted as sufficient proof evidence of the customary method and procedure of preparing the cargo for shipment saying at page 447:

“There must, of course, be some practical limits to the shipper’s obligation. In *The Neil Mærsk, supra*, where spontaneous heating of fish meal was involved, the shipper offered no admissible evidence of good condition. Here there is a voluminous testimony by tobacco men on the scene as to inspection and proper preparation of most of the tobacco shipped including the Cavalla belonging to Brown and Williamson and the Volos lots. It appears that Greek tobacco prepared for shipment is handled similarly by all shippers to the United States and that the tobacco here involved was handled in the customary manner.”

The opinion then discloses that certain of the lots of tobacco affected by the testimony mentioned above were damaged by *external* heat received from some of the bales which fermented and self-heated. Recovery was allowed as to the bales so damaged by *external* heat, the court accepting the evidence of customary preparation as being sufficient to establish good order and condition of the cargo at the commencement of the voyage.

The case of *Albers Bros. Milling Co. v. Hauptman*, 95 F.(2d) 286, was one in which it was affirmatively established that the corn there shipped contained an inherent defect consisting of an excess percentage of rancidity and acidity. That fact alone distinguishes it from the instant case. Also in that case the evidence disclosed that the heating came from within the kernels, not from an outside source as in this case.

Appellee having excluded all sources of heat other than the hold of the "DENALI" it is submitted that it has fully established that the damage occurred to this cargo while in the custody of the carrier.

8. Inherent Vice Is Relative.

Appellee has no quarrel with appellant's arguments under this heading as applied to the decided cases therein cited. However, the argument is inappropriate to the instant case and entirely beside the point involved herein. It assumes that the vessel afforded ordinary and usual conditions in the carriage of this cargo, which is obviously not the case. Stowage of herring under conditions producing a heat of at least

80°F. in the hold and 77°F. still in the barrels 19 hours after discharge can hardly be called ordinary normal stowage.

The barrels were processed and cured in exactly the same fashion under the same conditions which this shipper had maintained without loss or discovery of heat in the barrels for over 32 years. Clearly the deviation from the norm was on the part of the ship, not the shipper. Had the ship afforded the customary and ordinary stowage this loss would never have occurred.

9. Third Assignment of Error Relied Upon.

Appellant has raised the affirmative defense of "strike exception" and thereby assumed the burden of proving it. The evidence in favor of appellant establishes only that a strike occurred, that a portion of this cargo was not unloaded until September 25, 1946, and that upon discharge it showed the same evidence of heat damage found to exist in that portion of the cargo discharged from No. 3 hold.

That this evidence falls far short of establishing by a preponderance of the evidence that any damage occurred because of the strike is clearly shown by the following:

1. Appellant failed to show the condition of this portion of the cargo at the time the strike started and that it was any worse when the strike ended.

2. It failed to show that discharge of the vessel was in any way hindered or prevented by this strike.

3. It failed to show that proper cooling, ventilating

and other care of the cargo was in any way prevented by the strike. The mere occurrence of the strike should not entitle the carrier to simply throw up its hands and relieve itself of all duties toward the cargo.

4. It failed to show that the strike produced any condition likely to damage the herring. Exhibit 10 discloses an average temperature during this period of 61° F. and there is no evidence that exposure to this temperature would in any way damage the fish.

5. If it be assumed that there were some conditions arising out of the strike which contributed to the bad order of this shipment, appellant has failed to show what portion of the damage is due to such cause. In *The Lake Fabyan*, 283 Fed. 771, an issue of delay in discharge was raised by the vessel. The cargo involved was potatoes which were damaged by failure of the vessel to ventilate properly. At page 773 of the opinion the court said:

“This decaying condition being due to the negligence of the respondents in possession of the goods the burden was on them to show what portion, if any, of the damage was due to the unavoidable delay in discharging the cargo. They cannot put the burden on Branch who had no control of the potatoes, of proving what portion, if any, of them would have been saved had the cargo been promptly discharged.”

B. ARGUMENT IN SUPPORT OF THE JUDGMENT

Appellee has heretofore in this brief argued its position sufficiently on the matter of delivery to the “DENALI” in good order, arrival at destination in bad order, and the extent of its damage. Having proved

these points it is appellee's position that appellant was then required to either rebut or disprove such evidence or assume the burden of showing that the cause of the loss was something from which appellant is excused from liability pursuant to law. This appellant has wholly failed to do and it is appellee's position that the trial court's decision was therefore entirely correct.

The rule in this respect was early adopted by the Ninth Circuit in *The Medea*, 179 Fed. 781, decided in 1910. One of the questions raised on appeal was that relating to burden of proof, respondent contending that inasmuch as the libel alleged that the damage to the cargo resulted from unseaworthiness or bad stowage the burden of proof in this respect was on libelant. In reversing the District Court and awarding a decree for libelants the court said at page 786:

"These cases settle the rule beyond controversy that with respect to the liability of a common carrier for loss or damage to goods while in his possession the question as to the burden of proof is not one of pleading but of primary liability which the carrier must meet according to the tenor of his contract."

Again at page 792 the opinion stated:

"In the present case the burden of showing the connection between the damage by sea water and the exception against sea perils has not been discharged by the carrier. The cause of the damage to the cargo has been left to conjecture and we must look elsewhere for a satisfactory explanation. But libelants have not relied entirely on the inability of the respondent to prove that

the damage to the cargo arose from perils of the sea. They have introduced evidence tending to prove that the damage was caused by bad stowage. We will now proceed to consider that question."

The opinion then goes on to set out the evidence regarding stowage which was by masters of vessels and other qualified persons tending to show not enough weight had been placed in the 'tween decks to give the vessel the proper stability, therefore she rolled more than she should and shipped water. This was accepted by the court as sufficient evidence of bad stowage. In reaching its conclusion the court set forth the following quotations from the opinion indicated:

"The burden of proof lies on the carrier and nothing short of an express stipulation by parol or in writing should be permitted to discharge him from duties the law has annexed to his employment. The exemption from these duties should not depend upon implication or inference founded on doubtful and conflicting evidence but should be specific and certain leaving no room for controversy between the parties." *New Jersey Steam Navigation Co. v. Merchant's Bank*, 47 U.S. 347, (382) 12 L. Ed. 465.

"After the damage to the goods therefore has been established the burden lies on the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading." *Clark v. Barnwell*, 53 U.S. 272, 13 L. Ed. 985.

"When goods in the custody of a common carrier are lost or damaged the presumption of law is that it was occasioned by his default and the

burden is upon him to prove that it arose from a cause for which he is not responsible." *Nelson vs. Woodruff*, 66 U.S. 156, 17 L. Ed. 97.

"The burden of proof lies on the carrier and nothing short of clear proof leaving no reasonable doubt for controversy should be permitted to discharge him from duties which the law has annexed to his employment." *The Mohler*, 88 U.S. 230, 22 L. Ed. 485.

And also in the same opinion at page 786:

"The reason why the burden of proof is placed upon the carrier is that he or his servants know or at least ought to know the circumstances connected with the loss or damage to the cargo while the owner of the lost or damaged goods has no such knowledge and if he were required to furnish such proof it would operate as a denial of justice."

In *The Folmina*, 212 U.S. 354 action was brought to recover for damage to a cargo of rice damaged by the entrance of sea water. The evidence did not disclose the manner in which sea water entered the hold. In permitting a recovery the court said at page 363:

"As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier."

Perhaps the leading case on this point is *Schnell vs. The Vallescura*, 293 U.S. 296, where suit was brought to recover damages for injury to a shipment

of onions. It appeared that the onions were delivered in good order and condition, but arrived at destination in a state of decay. The evidence tended to show that the decay arose from the failure of the ship to properly ventilate the cargo. It was further apparent that lack of ventilation was excused for a portion of the voyage due to heavy weather, but that the ventilating system was also closed down during good weather. The Libelant did not attempt to distinguish between the damage occurring due to the failure to ventilate during heavy weather and that attributable to the failure to ventilate during good weather. Respondent therefore argued that Libelant had failed to carry the burden of proof by showing the damage expressly attributable to Respondent's negligence. In dismissing this contention and permitting a recovery the court said at page 304:

"The reason for the rule is apparent. He is a bailee entrusted with the shipper's goods with respect to the care and safe delivery of which the law imposes upon him an extraordinary duty. Discharge of the duty is peculiarly within his control. All the facts and circumstances upon which he may rely to relieve him of that duty are peculiarly within his knowledge and usually unknown to the shipper. In consequence, the law casts upon him the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability. (Citing cases)

"To such exceptions the law itself annexes a condition that they shall relieve the carrier from liability for loss from an excepted cause only if in the course of the voyage he has used due care to guard against it."

In *United States of America vs. Los Angeles Soap Co.*, 83 Fed. (2d) 875 (CCA9, 1936) the action was for recovery of damage to a cargo of cocoanut oil which was contaminated by fuel oil, and for a shortage of oil. Respondent showed that the damage was not caused by unseaworthiness, that it was partially caused by stranding resulting from a cause excepted by the bill of lading and the Harter Act and partly by failure to care for the cargo after stranding. In permitting a recovery the court said at page 880:

“The burden of showing that damage to cargo arose from one of the excepted causes is on the shipowner.” (Citing cases)

Again at page 881:

“Finally if the loss to cargo is caused by an excepted cause and by the shipowner’s negligence in the custody of the consignment the shipowner has the burden of showing what damage is attributable to the excepted cause and what loss has been the result of his own negligence.” (Citing *Schnell vs. The Vallescura*, 283 U.S. 296, 55 S. Ct. 194, 79 L. Ed. 373)

In *Waterman Steamship Corporation vs. United States Smelting, Refining & Mining Co.* (C.C.A. 5 1946), 155 Fed. (2d) 687, the action was to recover for 13 pieces of steel plate lost from the vessel in transit from Baltimore to Seattle. The bill of lading contained a provision expressly incorporating all of the provisions of the Carriage of Goods By Sea Act therein. The steel plates were piled on deck and the 13 were lost because a pelican hook securing the same straightened out during the voyage, permitting the plates to slide over the rail into the sea. The carrier

contended among other things that where goods are carried on deck the owner has the burden of affirmatively proving that the loss was caused by negligence in stowage or care; that the loss was occasioned by a latent defect in the pelican hook; that the loss was due to peril of the seas for which respondent is not liable. Libelant was permitted to recover. At page 691 the court said:

“Upon the carrier is placed the burden of going forward to show a peril of the sea or a latent defect; it also has the risk of non-persuasion.”

Again at page 693 the court says:

“Where it is doubtful whether a latent defect or a peril of the sea exists even in the absence of proof of any negligence the carrier has not carried its burden of proof. Therefore, we need not consider whether the carrier owed the shipper any duty of care in stowing the steel on board and whether the carrier discharged any such duty.

“In summary, the shipper may recover for the loss of the steel on either of two grounds: (1) The carrier did not bear its risk of non-persuasion in proving that a “peril of the sea” caused the loss; or (2) the carrier did not bear its risk of non-persuasion in proving that the “latent defect” caused the loss.”

The Lake Fabyan, (supra), 283 Fed. 771, as hereinbefore stated, was an action to recover for damage to barrels of potatoes, which the court concluded was due to lack of ventilation. On the issue as to the cause the opinion states:

“On behalf of the carrier there was testimony that the ventilation was sufficient and

some witnesses testified that perishable vegetables could be and had been carried on a voyage of like course and duration without ventilation. But the great weight of evidence from both sides was that ventilation is necessary to prevent decay. It is within common knowledge that it could hardly be otherwise. The construction of the ship and the method of stowing the potatoes need not be set out in detail. They were stowed from the hold upwards to the deck. Extra between decks had been placed on the ship. The hatches of the lower decks were closed and freight stowed over them so as to shut off air from that source. In addition the potatoes were subjected to some heat from the engines."

The Supreme Court of the United States adopted this rule long ago in *Clark v. Barnwell*, 12 How. 272, and has ever since adhered to it. The action was one to recover for damage to boxes of cotton thread which became mildewed on the voyage from Liverpool to Charleston. At page 132 the court said:

"And the main question in the case is whether or not the damage in question was occasioned by one of the perils and accidents within this clause of the bill of lading. For, as the masters and owners like other common carriers may be answerable for the goods although no actual blame is imputable to them and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss the question is not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods but whether it was occasioned by any of those causes which, either according to the

general rules of law or the particular stipulations of the parties afford an excuse for the non-performance of the contract. After the damage to the goods therefore, has been established the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading and even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and intention on the part of the persons employed in the conveyance of the goods; for then it is not deemed to be in the sense of the law such a loss as will exempt the carrier from liability but rather a loss occasioned by his negligence and inattention to his duty. Hence it is that although a loss occur by a peril of the sea yet if it might have been avoided by skill and diligence at the time the carrier is liable."

Appellant endeavored to show that conditions in lower No. 3 and No. 4 holds were such that it was impossible for herring to get hot while being transported therein. It also attempted by its evidence to eliminate bad stowage and steam pipes as the possible cause of the damage. In this it wholly failed to meet the burden which the law imposes. While not an appellate decision, *The Ciano*, (DCED, Pa. 1946) 69 Fed. Supp. 35, is a case which contains persuasive language. The action was to recover for damage to a cargo of paprika. The paprika was delivered in good order and outturned stained and caked and wet. Among the defenses

interposed by respondent was their assertion that the damage must have occurred prior to receipt of the cargo on board The Ciano and that it could not have happened on The Ciano. In finding for libelant the court said at page 40:

“While the preponderance of the evidence eliminates certain possible causes of damage, as condensation and ship’s sweat in lower hold No. 2 it does not lead to the conclusion that the damage could not have occurred while the paprika was within the range of the carrier’s duty to properly and carefully handle, carry, keep and care for it. See 46 USCA Sec. 1303(2). The condition of the cargo of thyme in the No. 2 lower hold on discharge at Philadelphia is not particularly helpful in view of the lack of evidence as to the location of the thyme in the ’tween deck.

“Under the circumstances the only reasonable conclusion is that the evidence adduced by the respondents discloses that they cannot account for the damage to the paprika.

“The libelant’s *prima facie* case of receipt on The Ciano in good condition must stand. The cargo was delivered in bad condition. The respondents have failed to show either that the damage did not occur aboard the vessel or that however it occurred it was not due to or contributed to by the fault of the carrier, its agents or its servants. Accordingly the libelant is entitled to recover herein.”

Where the cause of damage is left in doubt, the loss must fall on the carrier. See *Armco International Corporation v. Rederi A B Disa*, 151 F.(2d) 5, (CCA2, 1945), an action to recover for damage to

1313 iron plates damaged in transit by reason of the vessel loading a leaking barrel of acid on top of the plates. The acid corroded the plates. After discharge they were all mingled together and the damage did not become apparent for some time. The vessel argued that it should not be held for the entire damage because it was not shown how much occurred aboard the ship. The court in rejecting this contention and affirming a decree for libellant said at page 8:

“So far as there is any uncertainty as to the extent of the damage which happened while the plates were on board the ship has the burden of proof. *Schnell v. Vallescura*, 293 U.S. 296, 55 S. Ct. 194, 79 L.Ed. 373; *Commercial Molasses Corporation v. New York Tank Barge Corporation*, 314 U.S. 104, 62 S. Ct. 156, 86 L.Ed. 89; *United States v. Los Angeles Soap Company*, CCA9, 83 F.(2d) 875; *Wessels v. The Asturias*, CCA2, 126 F.(2d) 999; *Edmond Weil, Inc. v. American West African Line*, CCA2, 147 F.(2d) 363.”

See also *Sanib Corporation v. United Fruit Co.*, (DCSDNY, 1947) 74 F. Supp. 64. This was an action to recover for damages to banana powder which was completely destroyed in value by reason of exposure to the action of water or steam. Libellant's evidence showed that the banana powder was manufactured in its factory at Puerto Cortes; the details of storage awaiting shipment were shown and the highest temperature attained by the weather appears in the evidence, including all the periods up to the time of shipment. It further appears that

the banana powder was stowed in the after end of the upper 'tween deck which has a steam pipe line running along overhead from the engine room to the steering engine. A flange existed in this steam pipe line directly over the point where the banana powder was stowed and this flange was leaking. The cargo was transshipped from the first vessel and at this point it was learned that the banana powder had become spongy and plastic . When the powder gets in this condition it is wholly valueless. There were other transshipments thereafter and the evidence does not disclose what happened to the sacks after leaving the first vessel. Respondent was not permitted to escape liability upon the theory that there was no showing of how much damage occurred aboard its vessel, the court saying at page 66;

“This is a case therefore where clearly the cargo came by at least some of its damage after having been taken in the ship. Therefore the burden is upon the respondent (*Vizcaya*), (DCEDPa, 1945,) 63 F. Supp. 898) to absolve itself from fault and to bring itself within the causes excepted in the statute and upon which it relies. *Carriage of Goods By Sea Act*, Sec 4 (2) (i, m, n, p, q), 46 USCA 1304 (2) (i, m, n,p,q). And even if it could be found that there were concurring proximate causes of the damage only one of which was attributable to the respondent, the burden would be upon the latter to distinguish between the damage caused by its fault and that which was not. *Schnell v. The Vallescura* (1934) 293 U.S. 296, 55 S. Ct. 194, 79 L. ed. 373.”

In the same opinion appears the following at page 67;

“Considered in one aspect a leaky steam line in cargo space obviously constitutes unseaworthiness and although the mate of the SS Howard was called there was not the slightest effort to demonstrate due diligence to make seaworthy. In another aspect it was negligence on the part of the respondent to stow cargo like banana powder in space where it was subjected to the known hazards that a leaky steam line would produce, at least unless it was impossible to prevent the leak by the exercise of due care.”

Also in point is *The Mangalia*, 69 F. Supp. 688 (DCSDNY, 1946) an action to recover for damage to bales of skins which had become wet in transit. It appears from the opinion that the moisture came from a cargo of Valonia which has a high moisture content as well as from improper ventilation. This is, however, only an inference from the fact of stowing Valonia in the same space as the skins. Delivery in good order was shown. At page 693 the court said:

“From the evidence presented this court is satisfied that the fur skins when delivered to the ship were in apparent good order and when delivered in New York were in a damaged condition. The burden which the law imposes on the carrier of goods to explain the damage or bring himself within an exception which would excuse him has not been met in this case.”

CONCLUSION

The contentions of appellee may be summarized in the following manner:

1. Good Order and Condition.

The lower court's finding of good order and condition is amply supported by appellee's evidence of adherence to a tried and tested method of preparation, subjection of the cargo to a uniformly low temperature at all times when in appellee's possession and under its control, inspection of portions of the cargo right down to the approximate time of shipment, and by the issuance of a clean bill of lading.

2. Arrival at Destination in Bad Order.

The cargo from lower No. 3 hold was found damaged immediately on being landed and after cooling for 19 hours was still found to contain 77°F. of temperature. The only source of such temperature was the hold of the "DENALI" which registered 80°F. The cargo from lower No. 4 when landed on September 25 showed the identical type of damage found in that unloaded from No. 3 hold.

3. Damage.

Both parties agree that appellee's damage is \$18,783.92.

4. Appellant's Burden of Proof.

Appellant has wholly failed to prove any inherent vice in this commodity which will cause heating. The evidence is all to the contrary. It has wholly failed to show where the cargo while not under its care and control was subjected to conditions which would cause it to contain heat of 77°F. on arrival at destination.

Appellant has abandoned its other affirmative defenses except that of strike. It is not proved that the strike caused any specific conditions detrimental to this cargo, nor has it attempted to segregate the damage it alleges was due to the strike from that due to other conditions.

Appellee therefore contends that the judgment of the trial court should be affirmed.

Respectfully submitted,

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AXEL C. JULIN
(*Of Counsel*)

No. 12114

United States
Court of Appeals
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Appellant,
vs.

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a cooperative corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

FILED

JAN 26 1949

PAUL P. O'BRIEN, CLERK

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In the Circuit Court of the State of Oregon
for the County of Benton
No. 13318
Civ. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

COMPLAINT

Comes now the above-named plaintiff and for
cause of action against the above-named defendant,
complains and alleges:

I.

That at all times alleged herein, plaintiff was
and yet is a corporation organized and existing
under and pursuant to the co-operative laws of
the corporation laws of the State of Oregon.

II.

That at all times alleged herein, the defendant
was and yet is a corporation organized and exist-
ing under and pursuant to the laws of the State of
Michigan with its office and principal place of busi-
ness in the State of Michigan and licensed to trans-
act the general fire insurance business in the State
of Oregon and is organized for that purpose and
particularly for the purpose of writing and carry-
ing fire insurance upon mill stocks, grain, seeds,

and other merchandise and farm produce in the State of Oregon and has designated and appointed the Insurance Commissioner of the State of Oregon as its agent and attorney in fact for the acceptance of service of process all of which had been designated and is now designated under and pursuant to the laws of the State of Oregon; that defendant has no place of business established or at all in the State of Oregon.

That heretofore and on or about May 1, 1943, one Theodore Kowalski was operating a general feed and cleaning business in certain buildings within the city of Monroe, Benton County, State of Oregon, and was receiving, purchasing, and cleaning seeds and grain and at [1*] said time secured insurance policy No. 133021 issued by the defendant Michigan Millers Mutual Fire Insurance Company for a period of five years ending May 1, 1948; that thereafter and on May 1, 1944, the plaintiff herein purchased and acquired the said buildings and business of the said Theodore Kowalski and the said Kowalski assigned his interest in said insurance policy to the plaintiff and thereafter and on May 3, 1944, the defendant accepted said assignment and continued said insurance policy in force under the name of the plaintiff Grange Oil Company of Linn & Benton Counties, trading as Monroe Feed Store; that thereafter from time to time and by various endorsements placed thereon and for premiums paid and to be paid the said defendant com-

* Page numbering appearing at foot of page of original certified Transcript of Record.

pany insured and issued riders and parts of policy and scheduled endorsements attached to said original policy and insured all of the seeds, grain, and farm produce in the various buildings owned and operated by the plaintiff and on August 19, 1946, issued the endorsement insuring the said contents of building number one, Monroe, Benton County, Oregon, owned by the plaintiff, "frame, ironclad elevator and feed mill, known as Plant One," in the amount of \$120,000.00, and the said contents of building number two, at Monroe, Benton County, Oregon, "frame warehouse and seed cleaning plant known as Plant Two," in the amount of \$145,000.00, per cent of insurance under this policy in each instance 100%, limit of liability under this policy subject to any one fire \$145,000.00 for number two, and \$120,000.00 for number one, and various amounts for the contents of other buildings owned and operated by the plaintiff; that thereafter and during the summer, fall, and until the 9th day of January, 1947, seed, grain, and other farm products were stored in said building number two, known as Plant Number Two, in said endorsement and in addition to said insurance of \$145,000.00 on said contents, the plaintiff, with the consent of the defendant, secured additional insurance on the contents of said buildings, plant number two, as follows: In the Home Insurance Company, a sum of \$25,000.00, and \$8,333.00 in the Sun Insurance Company, a total of \$33,333.00 in additional insurance.

IV.

That thereafter the plaintiff had in said building

number two and covered by all three of said policies farm produce consisting of seeds, grain and kindred items of the sound value of \$121,410.31, all of which merchandise, seeds, and grains were in said building number two on January 9, 1947, at and when the same was burned and destroyed [2] by fire, save a salvage received therefrom in the amount of \$753.89, leaving a total loss of \$120,656.42; that the said insurance policy thus issued by the defendant herein stipulated and provided for the consideration of the premiums paid and to be paid to repay the plaintiff for the said loss of said property by fire; that heretofore the plaintiff made proof of loss which was accepted by the defendant and a true adjustment was made of said loss and of the value of the property destroyed as designated and described in the said insurance policy and it was agreed between plaintiff and the defendant that the total loss was the sum of \$120,656.42 and said accounting and adjustment was accepted by both plaintiff and the defendant and the two additional insurance companies; that thereafter the Home Insurance Company paid the full face value of its insurance policy in the sum of \$25,000.00 and the Sun Company paid the full amount of its policy in the sum of \$8,333.00, a total of \$33,333.00; that said sum deducted from the total loss of \$120,656.42, leaves a balance of the loss suffered in the sum of \$87,323.42.

V.

That thereupon the plaintiff made claim to the defendant herein for the payment of said sum of

\$87,323.42, the defendant's share of said loss as covered by said insurance policy; that the defendant paid the sum of \$70,760.07; that said payment was made through an agreement between plaintiff and defendant wherein and whereby the rights of plaintiff were in nowise to be jeopardized for the additional \$16,563.35 claimed to be due from the defendant to the plaintiff.

VI.

That said policy provided that the plaintiff would with other insurance keep the whole of said stock of grains, seeds, and insured items insured to 100% of its value; that plaintiff did keep said additional insurance and at all times kept and maintained sufficient additional insurance, together with the insurance carried with the defendant, to fully cover all of said merchandise, seeds and grains kept and stored within said building and did pay all premiums requested for said insurance and tendered any and all additional premiums that may be due for the insurance carried by plaintiff and has fully performed all and singular the insurance contract by it to be performed and has paid all insurance premiums that the defendant has exacted and has tendered [3] additional premiums, which amount is unknown to plaintiff but which may be found due in this court as due from the plaintiff to the defendant, and does hereby tender any additional premiums that may be found due from plaintiff to defendant; that each party has agreed that the amount, if any, still remaining due plaintiff shall

be determined in the courts and have waived any and all provisions for arbitration, if any prevail, in said policy of insurance or in the laws of the State of Oregon; that the sum of \$16,563.35 became due under the terms of said policy from the defendant to plaintiff upon the determination and adjustment and agreement as to the amount of said loss by said fire of January 9, 1947, and plaintiff made demand at said time to defendant on and prior to May 29, 1947, for the payment of the said balance due; that the plaintiff has performed all and singular the obligations of said contract by it to be performed.

VII.

That more than six months have elapsed since the adjustment of said loss and the refusal of the defendant to pay the balance due from the defendant to the plaintiff in the sum of \$16,563.35; that it has been and is necessary for plaintiff to employ counsel for the prosecution of this action and the collection of said sum; that the sum of \$1,500.00 is a reasonable sum to be allowed the plaintiff as attorneys' fees in this action.

Wherefore, plaintiff demands judgment against the defendant in the sum of \$16,563.35, with interest thereon at the rate of six per cent per annum from May 29, 1947, and for plaintiff's costs and disbursements herein, and the further sum of \$1,500.00 attorneys' fees.

WEATHERFORD & THOMPSON,

Attorneys for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed Dec. 23, 1947. [4]

In the District Court of the United States
for the District of Oregon

No. Civ. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

ANSWER

Comes now defendant and for its Answer to
plaintiff's complaint, admits, denies and alleges as
follows:

I.

Admits the allegations contained in Paragraphs
I and II of plaintiff's complaint.

II.

Answering Paragraph III, defendant admits that
it had issued a provisional policy of fire insurance
No. 133021 to Theodore Kolwalski, and that on
May 1, 1944, defendant consented to the assign-
ment of said policy to plaintiff, and defendant af-
fixed its endorsement No. 4, making plaintiff the
named insured under said policy.

III.

Answering Paragraph IV, defendant admits that on January 9, 1947, a fire destroyed a warehouse described in said Paragraph as Building No. 2 and caused damage in the total amount of \$120,656.42, and that for said damage plaintiff has heretofore been indemnified by the Home Insurance Company, a corporation, and the Sun Insurance Company, a corporation, in an amount approximating \$33,333.00.

IV.

Answering Paragraph V, defendant alleges that it has paid plaintiff pursuant to said policy No. 133021, the sum of \$70,966.89 and alleges that such payment constitutes full and complete payment of all sums that became due to plaintiff pursuant to said policy. [18]

V.

Alleges that the payment of said sum of \$70,-966.89 was made pursuant to an agreement in writing executed by plaintiff; that such payment was made and accepted without prejudice to the above cause of action by plaintiff and without prejudice to any defenses of defendant thereto.

VI.

Denies each and every allegation as set forth in plaintiff's complaint excepting such allegations as hereinbefore admitted and excepting such allegations as may be specifically admitted, stated,

or qualified in defendant's further and separate and affirmative answers and defenses, which said affirmative answers are made a part hereof for the purpose of this denial, the same as though fully set forth.

FIRST AFFIRMATIVE ANSWER AND DEFENSE

Comes now defendant and for its first separate and affirmative answer and defense to plaintiff's complaint alleges:

I.

That by an endorsement dated May 1st, 1944, defendant made plaintiff the named insured under its standard provisional stock fire insurance policy No. 133021 theretofore issued by defendant to Theodore Kowalski, and in consideration of the provisions and stipulations contained in said policy and of the payment of certain premiums then due and to become due, defendant agreed to insure plaintiff against all direct loss as determined and limited by the policy by fire to the property described in the schedule endorsements on said policy, and subject to all the provisions and stipulations contained in or added to said policy.

II.

That by amended schedule endorsement No. 10, dated August 19, 1946, the warehouse described in plaintiff's complaint as Building No. 2 was insured under and subject to the terms of said policy

and that a true copy of the said amended schedule endorsement, insofar as it pertains to said Building No. 2, is attached hereto, marked Exhibit "A," and made a part hereof for the purpose of this defense, the same as though fully set forth. [19]

III.

That said policy No. 133021 was made subject to the terms, provisions and stipulations contained in the standard provisional stock form, which said form was attached to and made a part of said policy on May 1, 1943, the date the said policy was issued, and that Paragraphs 1 through 15 of said standard provisional stock form are set forth in full in Exhibit "B," annexed hereto, and made a part hereof for the purpose of this defense, the same as though fully set forth.

IV.

That on January 9, 1947, said Building No. 2 was destroyed by fire and caused damage in a total amount of \$120,656.42.

V.

That in paragraph 3 of said standard provisional stock form, plaintiff promised and warranted to file with defendant at the end of each month, a true statement of the amount of non-provisional fire insurance in effect on said Building No. 2.

VI.

That on September 18, 1946, plaintiff reported in

writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of August, 1946.

That on October 11, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of September, 1946.

That on November 1, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of October, 1946.

That on December 13th, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of November.

That the report of December 13, 1946, was the last report of values and non-provisional stock insurance filed with the defendant prior to the loss on said Building No. 2 on January 9, 1947.

VII.

That on January 9, 1947, and during the months of August, September, October and November, 1946, there was, in fact, the sum of \$33,333.00 of non-provisional fire insurance on the stock in said [20] Building No. 2 in effect.

VIII.

That the reports of plaintiff alleged in Paragraph VI, *supra*, were the basis of computing the earned premium of defendant and of ascertaining the

amount of insurance in effect on said Building No. 2 during said period, and that the premium earned by defendant on the basis of plaintiff's report was less than the premium which defendant would have earned if a true report of the amount of non-provisional fire insurance on said Building No. 2 had been made.

IX.

That the above breach of warranty and non-fulfilment of plaintiff's promise to render a true report of the amount of non-provisional fire insurance was material to the risk of defendant under said policy and that defendant would not have underwritten the coverage on said Building No. 2 claimed by plaintiff, at the premium earned on the basis of plaintiff's report.

SECOND AFFIRMATIVE ANSWER AND DEFENSE

Comes now the defendant and for its second separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III and IV of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth.

II.

That on September 18, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true

statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of August, 1946.

That on October 11, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of September, 1946.

That on November 1st, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional fire insurance" on Warehouse No. 2 for the month of October, 1946.

That on December 13th, 1946, plaintiff reported in writing that the sum of \$50,000.00 was a "true statement of all non-provisional [21] fire insurance" on Warehouse No. 2 for the month of November.

That the report of December 13, 1946, was the last report of values and non-provisional stock insurance filed with the defendant prior to the loss on said Building No. 2 on January 9, 1947.

III.

That each of said reports was false and that on January 9, 1947, and during the months of August, September, October and November, 1946, there was, in fact, the sum of \$33,333.00 of non-provisional fire insurance on the stock in said Building No. 2 in effect.

IV.

That at the time it made the above reports, plaintiff knew that they were false and knew that defendant used the reports as a basis for computing its earned premium under said policy and intended that defendant rely on said reports.

V.

That defendant, in fact, relied upon said reports and computed its earned premiums on the basis thereof.

VI.

As a direct result of the falsity of said reports, defendant was damaged in that it earned a lesser premium for the period of time covered by said reports than it would have if a true report of the non-provisional stock insurance on Building No. 2 had been made.

VII.

That plaintiff is thereby estopped to claim that it had any other amount of non-provisional fire insurance on said Building No. 2 than the sum of \$50,000.00.

THIRD AFFIRMATIVE ANSWER AND
DEFENSE

Comes now the defendant and for its third separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III, IV, VI and VII of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth. [22]

II.

That on January 9, 1947, at the time of the fire loss in said Building No. 2, the actual cash value

of the stock located in said building was the sum of \$121,410.31.

III.

That pursuant to Paragraph 5 of said standard provisional stock form, annexed hereto as Exhibit "A," the amount of provisional insurance under said policy in effect on January 9, 1947, was the sum of \$71,410.31.

IV.

That the total amount of insurance in effect on said Building No. 2 was the sum of \$104,743.31.

V.

That said stock in Building No. 2 was under-insured in the amount of \$16,667.00.

VI.

That pursuant to Paragraph 7 of said standard provisional stock form annexed hereto as Exhibit "B," defendant was obligated to pay such percentage of the total loss of the property insured as the amount of provisional insurance defendant had in effect at the time of the loss bore to the total value of the insured property, and that pursuant to said Paragraph 7, defendant was obligated to indemnify plaintiff for the sum of \$70,966.89, which sum has been paid to the plaintiff.

FOURTH AFFIRMATIVE ANSWER AND
DEFENSE

Comes now the defendant and for its fourth separate and affirmative answer and defense, alleges:

I.

Realleges the allegations contained in Paragraphs I, II, III, IV, VI and VII of defendant's first separate and affirmative answer and defense, and incorporates the same herein by reference the same as though fully set forth.

II.

That plaintiff failed to correct said reports prior to the time of said loss, and by the terms of Paragraph 8 of said standard provisional stock form, annexed hereto as Exhibit "B," is precluded from making such correction or change after the time of said loss. [23]

III.

That pursuant to Paragraph 9 of said standard provisional stock form, annexed hereto as Exhibit "B," at the time of loss a premium for the insurance in effect on the stock in said Building No. 2 for the unexpired portion of the year became due and payable on the basis of the amount of the loss under the policy, and for the expired portion of the year on the basis of the reports rendered to defendant.

IV.

That said earned premium was computed on the basis of said reports and said amount of loss paid under the policy, and was paid by plaintiff, and amounted to the sum of \$1,260.88 for the period from August 19th, 1946, to May 1st, 1947.

V.

That defendant was precluded from charging a premium on the basis of the deficit in the amount of non-provisional stock insurance reported by the terms of Paragraphs 7 and 8 of said standard provisional stock form annexed hereto as Exhibit "B."

VI.

That defendant has, therefore, received no premium and no consideration for insuring the portion of said loss for which plaintiff asks recovery in this action.

Wherefore, having fully answered, defendant prays that plaintiff take nothing by its complaint and that defendant recover judgment from the plaintiff for its costs and disbursements herein.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Defendants.

EXHIBIT "A"

AMENDED SCHEDULE ENDORSEMENT

This Schedule Endorsement is a part of the Standard Provisional form attached to the policy described at the foot of this Endorsement.

Item No. 2. Location: Monroc, Oregon. Rate: 1.91. Description: Frame Warehouse and Seed Cleaning Plant, known as Plant No. 2. Limit of Insurance Subject to Any One Fire: \$145,000. Percent of Ins. under this Policy: 100%. Limit of Liability under this Policy Subject to any One Fire: \$145,000.

Attached to and made part of Policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

Issued to Grange Oil Company of Linn & Benton Counties trading as: Monroe Feed Store, Monroe, Oregon.

Dated August 19, 1946 (EC).

B. L. HEFLER,
Agent.

Endorsement No. 10

EXHIBIT "B"

STANDARD PROVISIONAL STOCK FORM
ANNUAL SETTLEMENT

Selling Price Basis

1. On stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies, not otherwise insured and not more hazardous, handled or used by the insured in their business, their own, or held by them in trust, or on storage if in case of loss the insured is legally liable therefor; all while contained in the building or buildings as located and described in the "schedule Endorsement" attached hereto, or while in or on cars or trucks within 100 feet of said buildings, except when carrier is liable.

2. It is understood that any specific amount of insurance named in this policy, or in certificates issued hereunder, and the first and subsequent annual premiums to be paid therefor are only provisional; and that the amount of insurance here-

under at any time on the stock described in Paragraph 1 shall be determined by the procedure outlined in Paragraph 5.

3. The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the "Schedule Endorsement," as of the close of business on each Saturday [25] of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.

4. It is agreed that wherever the term "Stock" is used in this form it shall be held to include all property covered hereunder as described in Paragraph 1 hereof. It is further agreed that wherever the term "Value" is used in this form it shall apply in the manner set forth in section (4a), (4b) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:

(4a) The value of stock, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock;

(4b) The value of stock, other than that manu-

factured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality.

(4c) The value of stock manufactured by the insured shall be the average carlot selling price.

5. The amount of Insurance under this form, at any time, at any location described in the "Schedule Endorsement," shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D 1. If the amount determined by Sections 5A, 5B and 5C is less than the "Limit of Insurance" named in the "Schedule Endorsement," at such location, the amount thus deter-

mined shall be the "Amount of Insurance under this form."

2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the "Limit of Insurance" named in the "Schedule Endorsement" at such location, the amount of the "Limit of Insurance" so named shall be the "Amount of Insurance under this form."

6. It is understood, however, that the amount of insurance under all policies covering under this form at each location shall not exceed the sum set opposite such location under the heading "Limit of Insurance"; and that the proportion of such insurance covered under this policy shall be the percentage of such insurance set opposite such location under the heading "Percentage of Insurance Under This Policy"; and in no event shall such proportion exceed the sum set opposite such location under the heading "Limit of Liability Under This Policy."

7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the "Limit of Liability Under This Policy," nor on any value protected by non-provisional insurance against the [26] hazards covered hereunder reported in accordance with Paragraph 3.

8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.

9. It is agreed that in the event of a loss a premium for the unexpired portion of the policy year based upon the amount of loss paid hereunder shall at once be due and payable.

10. Subject to all the terms and conditions of this policy, loss, if any, to be adjusted with the insured named herein and payable to the insured or order endorsed hereon for purposes of collateral security; but this insurance is void as to any subsequent owners or purchasers of the stock described herein.

11. This insurance shall not inure in any event to the benefit of any carrier.

12. This insurance does not cover storage or elevator charges.

13. The liability of this company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and shall be subject to all of the terms and conditions specified herein.

14. Co-Insurance Clause: In consideration of the acceptance by the insured of the following Co-insurance Clause a reduction from the established premium rate of \$..... to \$..... has been allowed on this insurance:

In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss.

15. If this policy be divided into two or more items as shown by the Schedule Endorsement attached hereto, all the foregoing conditions and limitations shall apply to each item separately.

16.

17.

18.

19.

20.

21.

Attached to and made part of policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

B. L. HEFLER,
Agent.

Dated May 1, 1943 (GT)

Selling Price Basis Form No. 156 M. M. F. P. B.
4-41.

(Affidavit of Service by Mail attached.)

(Duly Verified.)

[Endorsed]: Filed Feb. 13, 1948. [27]

[Title of District Court and Cause.]

PRETRIAL ORDER

A pretrial conference in the above-entitled action was held between the parties and counsel under the direction of the Court.

STATEMENT OF CASE

This is an action brought by the Grange Oil Company of Linn and Benton Counties, a co-operative corporation, against Michigan Millers Mutual Fire Insurance Company, a corporation, on a provisional stock fire insurance policy issued by defendant to plaintiff, insuring grain and other commodities stored in certain warehouses specified in the policy, to recover the sum of \$16,356.20, the balance which plaintiff claims over and above the sum of \$70,966.89, the amount which has been paid by defendant to plaintiff on a fire loss which occurred at one of the buildings covered by the policy on January 9, 1947.

The dispute is as to the amount of provisional insurance in effect under subject policy at the time of the loss and resulted from the fact that plaintiff inadvertently made false reports to defendant concerning the amount of specific insurance in effect and carried in other companies on the stock in the building in which the loss occurred.

The plaintiff claims that the errors in the reports to plaintiff given pursuant to the terms of the policy were inadvertent, and claims to have the right to correct the reports and pay the additional

premium which it would owe and thereby claims coverage as to the disputed portion of the loss

The defendant admits that the false reports made by plaintiff were not intentional and contends that the plaintiff is precluded by the terms of the policy from making any changes in the reports after a loss, and that according to the formula contained in the policy for computing the amount of provisional insurance in effect, and the defendant's share of the loss, plaintiff's claim under the policy has been paid. [30]

ADMITTED FACTS

I.

It is admitted that plaintiff is a co-operative corporation organized under the laws of the State of Oregon; that defendant is a corporation organized under the laws of the State of Michigan; that there is diversity of citizenship between plaintiff and defendant; that the amount in controversy in the above action, exclusive of interest and costs, is in excess of the sum of \$3,000.00; and that the Court has jurisdiction of the action.

II.

It is admitted that on January 9, 1947, plaintiff was the named insured under a provisional stock fire insurance policy No. 133021 issued by defendant, and previously assigned to plaintiff; that on said date said policy was in full force and effect; that under said policy the stock in a certain grain warehouse situated in Monroe, Oregon, and de-

scribed in the policy and referred to herein as Building No. 2, was insured; and that on said date a fire occurred in said building, resulting in a loss under the policy.

III.

It is admitted that the figures tabulated below represent the true values and amounts for the designated items as of January 9, 1947:

Limit of liability under policy on contents of Building	
No. 2	\$145,000.00
Actual value of contents of Building	
No. 2	\$121,410.31
Salvage value of contents	753.89
	<hr/>
	\$120,656.42
Actual amount of specific insurance carried in other	
companies	\$ 33,333.33

IV.

It is admitted that the report of actual cash values made to defendant pursuant to the policy for the month of November, 1946, was the last report received by the Company prior to the loss, and that the figures tabulated below represent the true values and amounts for the designated items for the month of November, 1946:

Average actual values as determined by plaintiff's report	
of actual cash values for the month of November.....	\$153,593.49
Actual amount of specific insurance carried in other	
companies	\$ 33,333.33
Report amount of specific insurance carried in other	
companies for the month of November.....	\$ 50,000.00

V.

It is admitted that the sum of \$70,966.89 has been paid by defendant to plaintiff and that said pay-

ment was made by defendant and accepted by plaintiff, without prejudice to the contention of either with respect to the construction of the policy and that plaintiff has performed all the conditions under the policy respecting notice and proof of loss.

VI.

It is admitted that plaintiff in its reports of actual cash values for the months of August, September, October and November of 1946 stated that there was \$50,000.00 of specific or non-provisional insurance on Building No. 2 and that, in fact, during the period of time which said reports covered, there was actually in effect \$33,333.33 of such insurance; that the errors in said reports were not intentional; that none of such reports were corrected prior to the loss; that defendant had no knowledge of the actual amount of specific insurance in effect; and, that no notice of the error in the reports was given the defendant prior to the loss; and, that the error did not come to the personal attention of the Manager of plaintiff's warehouse until after the loss.

ISSUES

Plaintiff's Contention:

I.

Plaintiff contends and defendant denies that defendant is liable to the plaintiff for the full sum of \$16,356.20, being the difference between the amount of the net loss and the sum of the amount heretofore paid plaintiff by defendant without prej-

udice and the specific insurance actually in effect at the time of the loss.

II.

Plaintiff contends and the defendant denies that the mistake made in good faith by plaintiff in reporting to defendant the actual specific insurance in effect at the time of the loss was without prejudice to any rights of the [32] defendant in that the error would have been discovered at the end of the premium year, if not sooner, by plaintiff in its annual audit of its records, and would then have been communicated to defendant or by defendant itself pursuant to its right to audit the plaintiff's records in computing the final premium due it for the preceding year's insurance coverage. The loss occurred before the error had been discovered and some four months prior to the anniversary date of the policy.

III.

Plaintiff contends and defendant denies that upon discovery of the error plaintiff would have paid defendant such additional premiums as an accurate report of the specific insurance would have entitled defendant to.

IV.

Plaintiff further contends and defendant denies that even if plaintiff had failed to pay the additional premiums, if any, due defendant, defendant's only remedy against plaintiff would have been for breach of contract to recover as damages the

difference between the premium actually collected from plaintiff and the premium due defendant on the basis of accurately reported specific insurance.

V.

Plaintiff contends and defendant denies that defendant immediately upon discovery of the error in reporting the specific insurance became entitled to additional premiums as a result thereof, and that plaintiff upon discovery of such error made timely tender of such additional premiums as were due defendant, which tender defendant rejected, and the plaintiff in its complaint filed herein in writing tendered, and here renews its tender of, such additional premium as the court may determine is due the defendant on the basis of the specific insurance actually in effect at the time of the loss.

VI.

Plaintiff contends and defendant denies that its agreement to furnish monthly reports of the amounts of specific or non-provisional insurance in effect from month to month is not a condition of promissory warranty but a simple promise only, the breach of which does not relieve defendant from any of its obligations under the policy but leaves defendant its remedy for breach of contract and damages resulting to it from such breach. [33]

VII.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured

are the sole basis of computing the premium earned under the policy.

VIII.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured are the sole basis of determining the amount of provisional insurance in effect under the policy at any given time.

IX.

Defendant contends and plaintiff denies that the reports of actual cash values given by the insured are the basis of determining whether or not to continue on the risk and whether there has been a material change in its liability in the risk.

ISSUES ON SPECIFIC POLICY PROVISIONS

Defendant's Contention:

I.

Paragraph 3 of the standard provisional stock form attached to the policy provides:

"The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the 'Schedule Endorsement' as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions

in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.”

Defendant contends and plaintiff denies that the false statements of the amounts of non-provisional insurance in effect for the months of August through November constitute a breach of warranty by plaintiff, which was material to the risk, and that defendant would not have underwritten the coverage claimed by plaintiff at the premium earned on the basis of plaintiff’s reports.

II.

Paragraph 5 of the standard provisional stock form attached to the policy provides: [34]

“The amount of Insurance under this form, at any time at any location described in the ‘Schedule Endorsement,’ shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

“Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

“Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

“Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3

shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

“Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement,’ at such location, the amount thus determined shall be the ‘Amount of Insurance under this form.’

“2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement’ at such location, the amount of the ‘Limit of Insurance’ so named shall be the ‘Amount of Insurance under this form.’ ”

Defendant contends and plaintiff denies that the amount of provisional insurance in effect on Building No. 2 on January 9, 1947, should be determined as follows:

Sec. 5A	
Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Sec. 5B	
Deduct amount of non-provisional or specific insurance ACTUALLY in effect on January 9, 1947.....	33,333.33
	<hr/>
	\$ 88,076.98

34 *Michigan Millers Mutual Fire Ins. Co. vs.*

Sec. 5C (1)

The actual values and amounts as determined from the records of plaintiff for the month of November, 1946, the last month for which a report of actual cash value was filed prior to loss	\$153,593.49
Less actual, specific insurance ACTUALLY in effect on January 9, 1947	\$ 33,333.33

Actual value not covered by specific insurance.....\$120,260.16

Sec. 5C (2)

Values and amounts as determined from report of November, 1946:

Value of stock	\$153,593.49
Less specific insurance reported.....	50,000.00

Values reported not covered by specific insurance.....\$103,593.49

Sec. 5C (3)

Actual value not covered by specific insurance.....	\$120,260.16
Less value reported not covered by specific insurance....	\$103,593.49

Values under-reported

Sec. 5C (4)

Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Deduct amount of non-provisional, or specific insurance ACTUALLY in effect on January 9, 1947.....	\$ 33,333.33
	\$ 88,076.98
Less values under-reported	\$ 16,666.67

Sec. 5D

Amount of provisional insurance in force under the policy	\$ 71,410.31
---	--------------

Defendant contends in the alternative and plaintiff denies that the amount of provisional insurance in effect at the time of the loss should be computed pursuant to the above summary as follows:

Sec. 5A

Actual value of stock on January 9, 1947, as determined by the records of plaintiff	\$121,410.31
---	--------------

Sec. 5B

Deduct amount of non-provisional, or specific insurance reported in the last report of actual cash values filed prior to loss	\$ 50,000.00
	<hr/>
	\$ 71,410.31

Sec. 5C

No difference between actual cash value of stock for November, 1946, and reports of cash values of stock for said month.

Sec. 5D

Amount of provisional insurance in effect under the policy at time of loss	\$ 71,410.31
--	--------------

III.

Paragraph 7 of the standard provisional stock form attached to the policy provides:

“The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the ‘Limit of Liability Under This Policy,’ nor on any value protected by non-provisional insurance against the hazards covered hereunder reported in accordance with Paragraph 3.”

Defendant contends and plaintiff denies that under this provision of the policy it is precluded from assessing a premium against the amount of specific insurance over-reported, and that the sole basis for determining the earned premium is the reports of actual cash values filed with it by plaintiff, and

that defendant has received no consideration for the coverage here claimed by plaintiff.

IV.

Paragraph 8 of the standard provisional stock form attached to the policy provides:

“It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.”

Defendant contends and plaintiff denies that under this provision of the policy no change in reports of actual cash values filed with the Company by plaintiff can be made after a loss has occurred, and that thereby plaintiff is precluded from correcting the amounts of specific or non-provisional insurance reported.

V.

Paragraph 14 of the standard provisional stock form attached to the policy provides:

“Co-Insurance Clause: In consideration of the acceptance by the insured of the following Co-insurance Clause, a reduction from the established premium rate of \$. to \$. has been allowed on this insurance:

“In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contribut-

ing insurance on each item of property insured by this policy to the extent of at least 100% of the [37] cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss "

Defendant contends and plaintiff denies that pursuant to this provision defendant was under-insured in the amount of \$16,667.67 and that thereby plaintiff must bear such proportion of the total loss as the amount of under-insurance bears to the actual value of the insured stock at the time of the fire, or the sum of \$16,563.50.

VI.

Defendant contends and plaintiff denies that plaintiff should be estopped to claim that it had any less than \$50,000.00 specific insurance on Building No. 2.

Plaintiff's Contention:

VII.

Plaintiff contends and defendant denies that the formulae set forth under defendant's contentions, based upon Sections 5A, 5B, 5C and 5D, are erroneous in that they interpret the word "value" as used in said paragraphs to include not only the value of the stock but the amount of non-provisional insurance, whereas Paragraph 4 of the standard provisional stock from endorsement of the policy specifically defines "value" to include only the value of the stock and not the amount of non-provisional insurance.

VIII.

Plaintiff contends and defendant denies that the true and only appreciable formula for determining the amount of provisional insurance is contained in Sections 5A and B of the provisional stock form endorsement and should be applied here as follows:

Sec. 5A	
Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
Sec. 5B	
Deduct the amount of non-provisional insurance against the hazards covered by the policy in effect on January 9, 1947	33,333.33
<hr/>	
Leaving a balance of	\$ 88,076.98

IX.

Plaintiff contends and defendant denies that the co-insurance clause hereinabove referred to as Section 14 of the standard provisional form endorsement has no application in this case because the plaintiff maintained and had in effect at the time of the loss contributing insurance on each item of property insured by defendant's policy to the extent of at least 100% of the actual cash value of the property at the time of the loss.

X.

Plaintiff contends and defendant denies that plaintiff should not be estopped to claim and prove that it had in effect at the time of the loss less than \$50,000.00 insurance on Building No. 2 because it reported a lesser amount of provisional insurance in good faith, as a result of pure error,

without knowledge of the error and without intent to deceive or defraud the defendant as a result thereof, and without the intention that the defendant would rely solely on its reports in fixing and adjusting its final premium.

EXHIBITS

Plaintiff offered for inspection by defendant and had marked for identification certain documents as pretrial exhibit herein. Defendant having inspected said documents, admitted the authenticity and genuineness thereof and waived all objections to their admissibility in evidence, except objections going to the relevancy, materiality or competency of said exhibits, which were identified in the record as follows:

No. 1. Insurance policy No. 133021 issued to defendant to plaintiff.

No. 2. Letter dated August 20, 1946, from The Mill Mutuals to Grange Oil Company.

No. 3. Letter dated October 2, 1946, from The Mill Mutuals to Monroe Feed Store.

No. 4. Letter dated February 11, 1947, from The Mill Mutuals to Grange Oil Company.

No. 5. Copy to letter dated February 18, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Ins. Co.

No. 6. Document entitled "Sworn statement in proof of loss," proposed proof of loss submitted by defendant to plaintiff.

No. 7. Carbon copy of letter dated March 10, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Ins. Co. [39]

No. 8. Carbon copy of proof of loss submitted to defendant by plaintiff.

No. 9. Letter dated March 11, 1947, from The Mill Mutuals to Mark V. Weatherford.

No. 10. Letter dated April 14, 1947, from The Mill Mutuals to Grange Oil Company.

No. 11. Carbon copy of letter dated April 24, 1947, from Grange Oil Company to The Mill Mutuals.

No. 12. Letter dated May 8, 1947, from The Mill Mutuals to Grange Oil Company.

No. 13. Carbon copy of letter dated June 12, 1947, from Manager of Grange Oil Company to The Mill Mutuals.

No. 14. Letter dated May 19, 1947, from law offices of Shank, Belt, Rode & Cook to Messrs. Weatherford & Thompson.

No. 15. Carbon copy of resolution of Board of Directors of Grange Oil Company, bearing date of May 28, 1947, unsigned.

No. 16. Tabulation of figures bearing heading, "Grange Oil Company of Linn and Benton Counties, Monroe, Oregon; Fire: January 9, 1947.

Defendant offered for inspection by plaintiff and had marked for identification certain documents as pretrial exhibits. Plaintiff having inspected said documents, admitted the authenticity and genuineness thereof and waived all objections to their admissibility in evidence, except objections going to the relevancy, materiality or competency of said

exhibits, which were identified in the record as follows:

No. 17. Resolution of plaintiff, dated May 28, 1947, embodying the agreement between plaintiff and defendant as to the payment and acceptance of the undisputed portion of the loss.

No. 18. Report of actual cash values made by plaintiff for the month of May, 1946.

No. 19. First report of actual cash values made by plaintiff for the month of June, 1946.

No. 20. Corrected report of cash values made by plaintiff for the month of June, 1946.

No. 21. Report of actual cash values made by plaintiff for the month of July, 1946.

No. 22. Reports of actual cash values made by plaintiff for the months of August, September, October and November, 1946.

No. 23. Work sheet of defendant, used in computing earned premium for the policy year May 1, 1946, to May 1, 1947.

No. 24. Provisional ledger sheet of defendant, showing posted average values for the stock in Building No. 2 for the policy year.

No. 25. Copy of letter of defendant to plaintiff dated July 10, 1946. [40]

No. 26. Copy of letter of defendant to plaintiff dated November 4, 1946.

Defendant reserves pretrial Exhibit 27 for the reports of actual cash values for the remainder of the year, which documents were exhibited to plain-

tiff and with respect to which plaintiff waives all identifying proof and reserves objection only as to the relevancy, materiality and competency of said exhibit.

XI.

Plaintiff has demanded in its complaint the sum of \$1500.00 as reimbursement to it for attorneys' fees in the institution, maintenance and prosecution of this action. Defendant admits that if plaintiff prevails in the action it would be entitled to a reasonable attorneys' fee and stipulates with plaintiff that the amount of the fee, in the event plaintiff prevails, may be fixed by the court with or without expert testimony, as the court may desire.

XII.

The parties agree that all issues of fact and law herein may be tried by the court without the intervention of a jury.

ORDER

It now appearing to the court that the foregoing is an appropriate statement of the pretrial proceedings,

It Is Ordered that the pretrial conference in this case having been held and participated in by all parties, the pleadings now pass out of the case and the foregoing be and the same is adopted as the Pretrial Order which shall govern the course of the trial and shall not be hereafter amended except by consent of the parties or by the Court to prevent manifest injustice.

Done and Dated in open court this 28th day of May, 1948.

CLAUDE McCOLLOCH,
District Judge.

Approved by:

/s/ HUGH L. BIGGS,
Of Counsel for Plaintiff.
/s/ JAMES K. BUELL,
Of Counsel for Defendant.

[Endorsed]: Filed May 28, 1948. [41]

[Title of District Court and Cause.]

DEFENDANT'S EXHIBIT No. 24

Provisional Ledger Sheet of Defendant Showing
Posted Average Values for the Stock in Building
No. 2 for the Policy Year:

Assured: Monroe Feed Store.

Risk: Frame Warehouse, Seeding Cleaning, Plant
No. 2.

Year: 1946.

Date	Weekly Values	Date	Weekly Values
8-24-46	\$ 133,223	11-23-46	\$ 102,299
8-31-46	124,737	11-30-46	100,704
9- 7-46	120,995	12- 7-46	124,244
9-14-46	116,963	12-14-46	126,153
9-21-46	134,636	12-21-46	121,820
9-28-46	108,468	12-28-46	110,777
10- 5-46	105,018	1- 4-47	92,896
10-12-46	104,618	1-11-47 .....	.....
10-19-46	107,603	1-18-47 .....	.....
10-26-46	106,403	1-25-47 .....	.....
11- 2-46	106,403		
11- 9-46	103,867		
11-16-46	104,695		
			\$2,256,522

DEFENDANT'S EXHIBITS Nos. 18, 19, 20,
21, 22 and 27

The following is a tabulation of the data contained in the above exhibits which were the reports of actual cash values made by plaintiff to defendant for the twelve months: May, 1946, through April, 1947, inclusive, and which data was contained on printed forms prefaced by the following representation:

“Following is a true statement of the actual cash values of all stocks located at the stations and in the buildings designated in the first column at the close of business upon each Saturday for the month of, 19.., as required under Paragraph 3 of the form attached to our Provisional Policies and all Non-Provisional Fire Insurance on such stock.

“We understand that if the average of the values entered in this statement is less than the average of actual cash values for the same days for which this statement is filed, the difference, in case of loss, shall be deducted from the actual cash value at the time of such loss, and the remainder (after deducting Non-Provisional Insurance, if any) shall constitute the actual amount of insurance in force under all policies covering under the Provisional Form, subject, however, to all of the conditions and limitations of such policies.”

[43]

REPORT OF ACTUAL CASH VALUES

May, 1946, through April, 1947

Month	Risk	1st week	2nd week	3rd week	4th week	5th week*	Non-Provisional Stock Ins.
May	Feed & Grain Plants.....	\$ 26,000.00	\$ 26,000.00	\$ 26,000.00	\$ 26,000.00	\$	\$
June	Feed & Grain Plants.....	-----	-----	-----	-----	-----	-----
	(corrected Report)	30,000.00	32,000.00	38,000.00	40,000.00	40,927.23	50,000.00
July	Feed & Grain Plants.....	45,000.00	82,000.00	136,079.15	244,328.29	-----	50,000.00
	(Posted)	-----	32,000.00	86,079.00	194,328.00	-----	-----
August	Plant No. 1	125,152.20	127,755.98	145,134.11	149,004.02	142,409.91	50,000.00
	Plant No. 2	151,647.00	177,714.12	178,893.12	183,223.30	174,737.26	50,000.00
	Flax Plant	78,967.75	107,756.81	115,207.16	115,207.16	115,207.16	30,000.00
Sept.	Plant No. 1	152,347.43	155,785.49	129,956.62	120,615.93	-----	50,000.00
	Plant No. 2	170,995.41	166,962.76	184,636.20	158,468.48	-----	50,000.00
	Flax Plant	115,207.16	103,322.52	76,336.59	56,646.59	-----	41,000.00
October	Plant No. 1	104,819.66	103,687.57	101,756.29	100,795.37	-----	50,000.00
	Plant No. 2	155,018.48	154,618.48	157,602.57	156,402.57	-----	50,000.00
	Flax Plant	46,172.98	39,280.43	32,179.15	25,620.23	-----	-----

Report of Actual Cash Values—(Continued)

May, 1946, through April, 1947

Month	Risk	1st week	2nd week	3rd week	4th week	5th week	Non-Provisional Stock Ins.
November	Plant No. 1	93,376.30	105,785.93	103,203.75	106,252.90	102,958.20	50,000.00
	Plant No. 2	156,402.57	153,867.40	154,695.20	152,298.60	150,703.62	50,000.00
	Flax Plant	25,620.23	15,956.10	.....	.....	.....	.....
December	Plant No. 1	99,423.82	96,752.39	76,171.44	80,507.39	.....	25,000.00
	Plant No. 2	149,243.50	151,153.23	146,819.56	135,777.18	.....	25,000.00
	— Note—Received after loss						
January	Plant No. 1	83,660.01	80,226.77	76,723.17	74,136.93	.....	41,667.00
	Plant No. 2	126,228.93	.....	.....	.....	.....	33,000.00
February	Feed & Grain Mill..	78,479.97	73,813.08	75,132.65	77,533.70	.....	41,667.00
March	Feed & Grain Mill.....	74,771.40	74,053.05	72,467.12	70,582.53	53,196.31	41,667.00
April	Feed & Grain Mill.....	50,912.30	43,537.78	47,412.75	43,866.26	.....	66,667.00

(Duly Verified.)

In the District Court of the United States
for the District of Oregon

Civil No. 4023

[Title of Cause.]

Copies of Plaintiff's Exhibit No. 2 and Defendant's
Exhibits Nos. 25 and 26 for Record on Appeal

PLAINTIFF'S EXHIBIT No. 2

“August 20, 1946.

“Grange Oil Company of Linn
and Benton Counties

Monroe, Oregon

Attention: Mr. Jones, Mgr.

“Gentlemen:

“This will confirm our telephone conversation of yesterday regarding additional insurance on stock in Plants No. 1 and No. 2 at Monroe and the flax warehouse outside of Monroe.

“Regarding Plant No. 1, we are establishing a limit effective August 19, of \$120,000. We understand you have specific insurance applying in this house of \$37,500 which will give you a total protection of \$157,500 as of this date.

“Regarding Plant No. 2 we have established a limit of \$145,000 which with the specific insurance of \$37,500 will give you total protection of \$182,500 in this house.

“Regarding the flax warehouse we have established a limit of \$86,000 there which with the \$30,000 specific insurance gives you a total protection of \$116,000 in this house.

“Should your values increase in any of the above houses, we suggest that you place any additional insurance required through your local agent as we have now about all we can handle in the above-mentioned locations. [47]

“In looking over Michigan Millers Policy 133021, your provisional policy covering stock, we note that the old mill, elevator and warehouse and the “Red” warehouse and the S. P. Depot building were included in the coverage. In our conversation yesterday we apparently overlooked establishing a limit on these houses. We can include them under Item No. 1 at the present limit if that is satisfactory with you, or we can establish separate limits on these auxiliary houses if you so desire but please let us know how you want it handled.

“Very truly yours,

THE MILLS MUTUALS,
/s/ N. J. SANKELA,
Ass't Manager.”

DEFENDANT'S EXHIBIT No. 25

“July 10, 1946.

“Monroe Feed Store
Monroe, Oregon

“Gentlemen:

“We are in receipt of your report of values for the month of June in which you show no values for the month.

“It seems rather strange that a business of this size would have no values on stock unless of course

you have some specific insurance which was mentioned in some correspondence some time ago. With the thought in mind that this provisional policy is not fully understood, we would call your attention to the fact that under the terms and requirements of that policy all values in the house must be reported to us. Then if there is any specific insurance, it is shown out in the last column and if it exceeds the actual values, then there would be no liability under our policy.

“Therefore on the basis of the policy coverage and requirements, we will appreciate it if you will make up a new form for June showing the total values in the plant and the amount of specific insurance in the last column. That will enable us to make the proper entry here. [48]

“If any further information is desired regarding this coverage and its requirements, we would appreciate your request for further information.

“Very truly yours,

THE MILLS MUTUALS,

By,

Manager.”

DEFENDANT’S EXHIBIT No. 26

November 24, 1946.

“Monroe Feed Store
Monroe, Oregon

“Gentlemen:

“We are in receipt of your report of values for the month of October. You have a \$200,000 limit

under Item No. 1 and have only \$100,000 of value. We are merely calling this to your attention because you have \$50,000 of specific insurance and you probably don't need to continue it if you do not want to.

"On Item No. 2 you are still over our limit but a portion of the specific insurance could be discontinued if you wanted to do so.

"Very truly yours,

THE MILLS MUTUALS,
By
Manager."

(Duly Verified.)

[Endorsed]: Filed Oct. 3, 1948. [49]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

I don't feel that a clause in an insurance contract should be given the legal effect of a warranty, unless the policy makes it plain that this was intended. It is not plain in this case. Therefore, testing the situation by the usual rule of damages, plaintiff is liable for the premium, while defendant remains liable for the insurance.

I would like to settle the Findings next week.

Dated August 30, 1948.

CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Aug. 30, 1948. [51]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came regularly on for trial before the undersigned, a judge of the above-entitled court, on the 28th day of May, 1948. Plaintiff appeared through its attorneys, Mark V. Weatherford of Weatherford & Thompson, Albany, Oregon, and Hugh L. Biggs of Hart, Spencer, McCulloch & Rockwood, Portland, Oregon, and defendant appeared through its attorneys, James K. Buell and Earl S. Nelson of Griffith, Peck, Phillips & Nelson. The issues of fact and law having been set forth in a pretrial order approved by the parties and signed by the court, and the parties having waived trial of the fact issues by a jury and agreed to try all issues of fact and law before the court without a jury, they thereupon introduced testimony and evidence in support of their respective cases and thereafter argued their contentions of fact and law to the court. The court having thereafter taken the case under advisement, and having fully and carefully considered the evidence and law bearing on the issues, and being now fully advised, makes the following

FINDINGS OF FACT

I.

Plaintiff is now and at all the times material herein was a cooperative corporation organized and existing under and by virtue of the laws of

the State of Oregon. It was and is now engaged in operating a general feed and seed cleaning business, in connection with which it owns and operates certain buildings within the City of Monroe, Benton County, Oregon, including a certain seed cleaning plant and warehouse, in the policy and hereinafter referred to as Building No. 2. [52]

II.

Defendant is and at all times herein material was a corporation organized and existing under and by virtue of the laws of the State of Michigan, is and was licensed to engage and was engaged in the business of writing fire insurance in the State of Oregon.

III.

A diversity of citizenship exists between the parties and the amount in controversy between them exceeds \$3,000.

IV.

On May 1, 1943, defendant issued its fire insurance policy No. 133021, in the form required and authorized by the statutes of the State of Oregon, to Theodore Kowalski, the then owner of said Building No. 2, insuring the owner thereof against loss of the contents of said Building No. 2 by fire. Said policy was issued for a period of five years, ending May 1, 1948. The maximum limit of liability of the defendant for loss of the contents of said Building No. 2 was \$145,000. Said policy bore a "Standard Provisional Stock Form" endorsement. Under said policy and its endorsement de-

fendant's liability in case of loss, subject to the over-all limit of \$145,000, was to be determined in accordance with the formula set forth in section 5 of said Standard Provisional Stock Form, which provided generally that the amount of provisional insurance available to the insured would be the difference between the actual value of the stock destroyed by fire and the actual amount of specific fire insurance carried by the insured in other insurance companies and available to the insured at the time of the fire. The policy provided that the insured pay a provisional premium based upon an amount equal to 25% of the limit of liability of the policy at the beginning of each policy year. The insured agreed, in consideration of the insurer's obligations, to report at the end of each month during the policy year the value of goods on hand at the close of business on Saturday of each week of the month for which the report was rendered and the amount of specific insurance on the goods covered by the policies carried by the insured in other insurance companies. The actual and total amount of the premium to be paid by the insured under the policy was to be determined at the end of the policy year [53] or at the time of any loss or termination of the policy prior to the end of the policy year on the basis of the monthly report submitted by the insured. A copy of the Standard Provisional Stock Form endorsement attached to said policy is marked "Exhibit A," attached hereto and made a part of these findings.

V.

On May 1, 1944, Theodore Kowalski, the named insured under said policy at the time of its issuance and the then owner of Building No. 2, conveyed to plaintiff said Building No. 2, and with the consent of the defendant assigned to plaintiff said policy No. 133021. Continuously thereafter to and including the date of loss by fire hereinafter referred to, plaintiff paid the premiums required and maintained said policy in full force and effect.

VI.

On January 9, 1947, while said policy of insurance was in full force and effect, a fire destroyed the stock of goods in said Building No. 2. The net value of the stock of goods destroyed, that is, after deduction of salvage, was \$120,656.42. On the date of said fire there were in full force and effect two policies of specific insurance in an aggregate amount of \$33,333.33 issued to plaintiff by insurance companies other than defendant and covering the contents of said Building No. 2.

VII.

Due to error, inadvertence and mistake, plaintiff in good faith reported to defendant in the months of August, September, October and November of 1946 that plaintiff had \$50,000 of specific fire insurance in insurance companies other than defendant on the contents of said Building No. 2, whereas in truth and fact plaintiff had only \$33,333.33 of specific fire insurance on the contents of said Build-

ing No. 2 during the months of August, September, October and November of 1946. The error was not discovered by either of the parties hereto until soon after the fire occurred and the investigation and adjustment of the loss resulting therefrom were being made. [54]

VIII.

Notice of said fire and proof of loss thereunder were duly and regularly given by plaintiff to defendant. The amount of the loss claimed by plaintiff was \$87,323.09, being the difference between the net value of the goods destroyed, that is, \$120,656.42, and the actual amount of specific fire insurance at the time of the fire, that is, \$33,333.33. Defendant refused to pay plaintiff's said claim in full but has paid to plaintiff the sum of \$70,966.89, being the difference between the net value of the goods destroyed, \$120,656.42, and the amount of specific fire insurance reported by plaintiff, plus certain adjustments agreed to by the parties not here material. Said payment was made by defendant and received by plaintiff under a stipulation between the parties that such payment was without prejudice to the position of either of the parties in any manner whatsoever in the event of litigation with respect to the balance claimed by plaintiff to be due it under policy, that is, \$16,356.20.

IX.

On the 24th day of April, 1947, plaintiff notified defendant that it claimed payment of the said sum

of \$16,356.20, which said sum defendant has wholly failed, neglected and refused to pay.

X.

Plaintiff was required to and did employ attorneys to institute and prosecute this action and necessarily incurred legal fees in connection therewith in the reasonable amount of \$1500. (Mc.C.)

From the foregoing findings of fact the court draws the following

CONCLUSIONS OF LAW

I.

This court has jurisdiction of the parties to and the subject matter of this case.

II.

Plaintiff's obligation, as set forth in section 3 of the Standard Provisional Stock Form endorsement on policy No. 133021, to report the amount of specific insurance in force on the goods covered by defendant's policy did not constitute a promissory warranty but merely an independent promise.

III.

Plaintiff's error in reporting to defendant the amount of specific insurance in effect did not relieve defendant from liability to pay the full amount of plaintiff's loss, less the actual amount of specific insurance carried by plaintiff on the insured goods.

IV.

The amount of the loss for which defendant became liable to plaintiffs under its policy as a re-

sult of the fire was \$87,323.09. To said sum should be credited the amount of \$70,966.89, leaving a balance due plaintiff from defendant, as of the date of said credit, in the sum of \$16,356.20.

V.

Plaintiff is entitled to judgment against defendant in the principal amount of \$16,356.20, together with interest at the rate of 6% per annum from and after the 24th day of April, 1947, together with attorneys' fees in the amount of \$1500, and for its costs and disbursements to be taxed herein.

Dated this 20th day of September, 1948.

CLAUDE McCOLLOCH,
District Judge. [56]

EXHIBIT A

Standard Provisional Stock Form
Annual Settlement

Selling Price Basis

1. On stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies, not otherwise insured and not more hazardous, handled or used by the insured in their business, their own, or held by them in trust, or on storage if in case of loss the insured is legally liable therefor; all while contained in the building or buildings as located and described in the "Schedule Endorsement" attached hereto, or while in or on cars or trucks within 100 feet of said buildings, except when carrier is liable.

2. It is understood that any specific amount of insurance named in this policy, or in certificates issued hereunder, and the first and subsequent annual premiums to be paid therefor are only provisional; and that the amount of insurance hereunder at any time on the stock described in Paragraph 1 shall be determined by the procedure outlined in Paragraph 5.

3. The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the "Schedule Endorsement," as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.

4. It is agreed that wherever the term "Stock" is used in this form it shall be held to include all property covered hereunder as described in Paragraph 1 hereof. It is further agreed that wherever the term "Value" is used in this form it shall apply in the manner set forth in sections (4a), (46) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:

(4a) The value of stock, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock.

(4b) The value of stock, other than that manufactured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality. [57]

(4c) The value of stock manufactured by the insured shall be the average carlot selling price.

5. The amount of Insurance under this form, at any time, at any location described in the "Schedule Endorsement," shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the "Limit of Insurance" named in the "Schedule Endorsement," at such location, the amount thus determined shall be the "Amount of Insurance under this form."

2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the "Limit of Insurance" named in the "Schedule Endorsement" at such location, the amount of the "Limit of Insurance" so named shall be the "Amount of Insurance under this form."

6. It is understood, however, that the amount of insurance under all policies covering under this form at each location shall not exceed the sum set opposite such location under the heading "Limit of Insurance"; and that the proportion of such insurance covered under this policy shall be the percentage of such insurance set opposite such location under the heading "Percentage of Insurance Under This Policy"; and in no event shall such proportion exceed the sum set opposite such location under the heading "Limit of Liability Under This Policy."

7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the "Limit of Liability Under This Policy," nor on any value protected by non-provisional insurance against the hazards covered

hereunder reported in accordance with Paragraph 3.

8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.

9. It is agreed that in the event of a loss a premium for the unexpired portion of the policy year based upon the amount of loss paid hereunder shall at once be due and payable.

10. Subject to all the terms and conditions of this policy, loss, if any, to be adjusted with the insured named herein and payable to the insured or order endorsed thereon for purposes of collateral security; but this insurance is void as to any subsequent owners or purchasers of the stock described herein.

11. This insurance shall not inure in any event to the benefit of any carrier.

12. This insurance does not cover storage or elevator charges.

13. The liability of this company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and shall be subject to all of the terms and conditions specified herein.

14. Co-insurance Clause: In consideration of the acceptance by the insurance of the following Co-insurance Clause a reduction from the estab-

lished premium rate of \$. to \$. has been allowed on this insurance: In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss.

15. If this policy be divided into two or more items as shown by the Schedule Endorsement attached hereto, all the foregoing conditions and limitations shall apply to each item separately.

16.

17.

18. [59]

19.

20.

21.

Attached to and made part of policy No. 133021 of the Michigan Millers Mutual Fire Insurance Company, Lansing, Michigan.

Dated May 1, 1943 (GT)

B. L. HEFLER,
Agent.

Selling Price Basis Form No. 156 M.M.F.P.B.
4-41.

(Acknowledgment of Service.)

[Endorsed]: Filed September 20, 1948. [60]

In the District Court of the United States
For the District of Oregon.

Civil No. 4023

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a co-operative corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan corpora-
tion,

Defendant.

JUDGMENT

This cause came regularly on for trial before the undersigned, a judge of the above entitled court, on the 28th day of May, 1948. Plaintiff appeared through its attorneys, Mark V. Weatherford of Weatherford & Thompson, Albany, Oregon, and Hugh L. Biggs of Hart, Spencer, McCulloch & Rockwood, Portland, Oregon, and defendant appeared through its attorneys, James K. Buell and Earl S. Nelson of Griffith, Peck, Phillips & Nelson. The issues of fact and law having been set forth in a pretrial order approved by the parties and signed by the court, and the parties having waived trial of the fact issues by a jury and agreed to try all issues of fact and law before the court without a jury, they thereupon introduced testimony and evidence in support of their respective cases and thereafter argued their contentions of fact and law to the court. The court having

thereafter taken the case under advisement, and having fully and carefully considered all the issues of fact and law arising herein, and having heretofore found in favor of plaintiff and against defendant, and having made and entered its Findings of Fact and Conclusions of Law, and the case now coming on for judgment in accordance therewith,

It Is Considered, Ordered and Adjudged that plaintiff have and it is hereby granted judgment against defendant in the principal [61] sum of \$16,356.20, together with interest thereon at the rate of 6% per annum from and after the 24th day of April, 1947, and in the further sum of \$1500 attorneys' fees, and for plaintiff's costs and disbursements incurred herein, taxed at \$.....

Done and dated in open court this 20th day of September, 1948.

CLAUDE McCOLLOCH,
District Judge.

Entered in docket September 20, 1948.

[Endorsed]: Filed Sept. 20, 1948. [62]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Grange Oil Company of Linn & Benton Counties, a co-operative corporation, Plaintiff, and Weatherford & Thompson and Hart, Spencer, McCulloch & Rockwood and Hugh L. Biggs, its attorneys.

Notice is hereby given that Michigan Millers Mutual Fire Insurance Company, a Michigan corporation, defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the above action on September 20th, 1948.

GRIFFITH, PECK,

PHILLIPS & NELSON,

By JAMES K. BUELL,

Attorneys for Appellant, Michigan Millers Mutual Fire Insurance Company.

[Endorsed]: Filed Oct. 14, 1948.

[63]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL
PURSUANT TO RULE 75(d)

Defendant appellant having filed its notice of appeal from judgment of this Court to the Circuit Court of Appeals for the Ninth Circuit, and having designated portions of the record herein to be contained in the record on appeal, hereby files its statement of the points on which it intends to rely upon appeal, as follows:

I.

The Court erred in finding that Section 5 of the Standard provisional stock form of subject policy insurance provided generally that the amount of provisional insurance available to the insured

would be the difference between the actual value of the stock destroyed by fire and the actual amount of specific fire insurance carried by the insured in other insurance companies and available to the insured at the time of the fire.

II.

The Court erred in finding that the subject policy of insurance insured values which plaintiff had reported to be covered by specific insurance in other companies.

III.

The Court erred in finding that the obligation of plaintiff as set forth in Section 3 of the standard provisional stock form of subject policy to report the amount of specific insurance in force on the goods covered by defendant's policy did not constitute a promissory warranty. [64]

IV.

The Court erred in finding that plaintiff's error in reporting to defendant the amount of specific insurance in effect did not relieve defendant from liability to pay the full amount of plaintiff's loss less the actual amount of specific insurance carried by plaintiff on the insured goods.

V.

The Court erred in finding that the amount of subject loss for which defendant became liable to plaintiff under its policy as a result of the fire was the sum of \$87,323.09.

VI.

The Court erred in failing to find that the amount of insurance in effect under subject policy at the time of the loss as determined by the express terms of the policy and without regard to warranty was the sum of \$71,410.31.

VII.

The Court erred in finding that plaintiff was entitled to judgment in the sum of \$16,356.20 or in any amount.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By JAMES K. BUELL,

Attorneys for Appellant, Michigan Millers Mutual
Fire Insurance Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Oct. 30, 1948. [65]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD
ON APPEAL PURSUANT TO RULE 75(a)

Comes now defendant-appellant and designates the following portion of the record proceedings and evidence in the above cause to be contained in the record on appeal of said cause.

(1) Transcript of removal proceedings from Circuit Court of the State of Oregon for the County of Benton to this court (including petition for

removal, order of removal and other documents pertaining to such removal.)

(2) Complaint filed in the above court February 10, 1948.

(3) Answer filed in the above court February 13, 1948.

(4) Pre-trial order dated May 28, 1948.

(5) Transcript of testimony and proceedings at the trial of the above cause on May 28, 1948, including plaintiff's original exhibit No. 1 and defendant's original exhibits Nos. 19, 20 and 22.

(6) Tabulation of data contained in defendant's exhibits Nos. 18, 19, 20, 21, 22, 24 and 27. [66]

(7) Copies of plaintiff's exhibit No. 2 and Defendant's exhibits Nos. 25 and 26 for record on appeal.

(8) Memorandum of decision dated August 30, 1948.

(9) Findings of fact and conclusions of law dated September 20, 1948, showing date of entry thereof.

(10) Judgment dated September 20, 1948, showing date of entry thereof.

(11) Notice of Appeal to Circuit Court of Appeals for the Ninth Circuit showing date of filing thereof.

(12) Statement of points upon which appellant will rely on appeal.

(13) Designation of contents of record on appeal.

(14) Order to forward original exhibits as follows: plaintiff's exhibit No. 1 and defendant's exhibits Nos. 19, 20 and 22.

GRIFFITH, PECK, PHILLIPS
& NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Appellant Michigan Millers Mutual
Fire Insurance Company.

(Acknowledgment of Service.)

[Endorsed]: Filed October 30, 1948. [67]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
RECORD ON APPEAL

On ex parte motion of defendant supported by stipulation of the parties, it is hereby considered and ordered that the time in which to file and docket the Record on Appeal of the above cause to the United States Circuit Court of Appeals for the Ninth District be and it hereby is extended to and including December 23, 1948.

Dated at Portland, Oregon, this 15th day of November, 1948.

JAMES ALGER FEE,
District Judge.

[Endorsed]: Filed Nov. 15, 1948. [68]

[Title of District Court and Cause.]

ORDER

On motion of defendant-appellant, it is hereby.

Considered and Ordered that the clerk of this court forward to the Circuit Court of Appeals for the Ninth Circuit in connection with the appeal of the above-entitled cause plaintiff's original exhibit No. 1, and defendant's original exhibits Nos. 19, 20 and 22, in accordance with the usual practice of this court in regard to the safekeeping and transportation of original exhibits.

Dated at Portland, Oregon, this 30th day of October, 1948.

/s/ CLAUDE McCOLLOCH,

District Judge.

[Endorsed]: Filed November 30, 1948. [69]

[Title of District Court and Cause.]

DOCKET ENTRIES

1948

Feb. 10—Filed Transcript on Removal from Benton Co.

Feb. 10—Filed praecipe of Atty. Hugh L. Biggs to appear in this cause.

Feb. 13—Filed answer.

Mar. 1—Entered order setting for pre-trial Apr. 5, 1948. Fee.

Mar. 22—Entered order resetting for pre-trial on May 17, 1948 & order setting for trial on May 25, 1948, 10 a.m. McC.

1948

May 19—Filed pre-trial exhibits.

May 20—Entered order resetting for trial on May 27, 1948, 10 a.m. McC.

May 24—Entered order resetting for trial on May 28, 1948, 10 a.m. McC.

May 28—Record of trial before court, order to submit briefs & order continuing for argument, and filed & entered pre-trial order. McC.

June 4—Entered order setting for argument on the merits on June 19, 1948, 10 a.m. McC.

June 12—Filed Memorandum Brief for Plaintiff.

June 15—Entered order resetting for argument on merits on June 26, 1948. McC.

June 16—Filed transcript of proceedings of May 28, 1948.

June 26—Record of argument on merits. McC.

July 6—Filed Plaintiff's Reply Memorandum.

Aug. 19—Filed Plaintiff's comments as requested by trial judge & attached letter.

Aug. 30—Filed Memorandum opinion. McC.

Sept. 8—Entered order setting hearing on settlement of Findings of Fact & Conclusions of Law for Sept. 13, 1948, 2 p.m. McC.

Sept. 10—Entered order resetting hearing in settlement of Findings & Conclusions for Sept. 15, 1948. McC.

Sept. 13—Record of hearing in settlement of Findings & Conclusions, reserved. McC.

Sept. 20—Filed & entered Findings of Fact & Conclusions of Law. McC.

1948

Sept. 20—Filed & entered Judgment for ptff. for \$16,356.20 with interest at the rate of 6% from Apr. 24, 1947, and \$1500 atty. fees. McC.

Sept. 20—Entered judgment in Lien Docket.

Sept. 30—Filed cost bill of ptff. with attached notice.

Oct. 11—Filed supersedeas bond on appeal. Approved by Judge Fee.

Oct. 14—Filed Notice of Appeal by defendant.

Oct. 14—Copies of notice of appeal mailed to Hugh L. Biggs, Portland, & Mark Weatherford, Albany.

Oct. 15—Filed affidavit of Jas. K. Buell.

Oct. 15—Filed affidavit of mailing.

Oct. 23—Filed transcript of proceedings May 25, 1948, in duplicate.

Oct. 30—Filed statement of points.

Oct. 30—Filed designation of record.

Oct. 30—Filed motion of appellant to forward exhibits 1, 19, 20 and 22.

Nov. 15—Filed and entered order extending time to docket record on appeal.

Nov. 15—Filed stipulation.

Nov. 30—Filed and entered order to send original exhibits to Court of Appeals. [70]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,

District of Oregon—ss.

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 71, inclusive, constitute the transcript of record on appeal from a judgment of said court in a cause therein numbered Civil 4023, in which Grange Oil Company of Linn and Benton Counties, a co-operative corporation, is plaintiff and appellee, and Michigan Millers Mutual Fire Insurance Company, a Michigan corporation, is defendant and appellant; that the said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant, and in accordance with the rules of this court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation as the same appears of record and on file in my office and in my custody.

I further certify that I have enclosed under separate cover a duplicate transcript of proceedings of May 28, 1948, taken and filed in this office in this cause, together with exhibits Nos. 1, 19, 20 and 22 filed in this cause.

I further certify that the cost of comparing and certifying the within transcript is \$37.35, and the

cost of filing notice of appeal is \$5.00, making a total of \$42.35, and that the same has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 2nd day of December, 1948.

[Seal] LOWELL MUNDORFF,
Clerk.

By /s/ F. H. BUCK,
Chief Deputy. [71]

In the District Court of the United States
for the District of Oregon

Civil No. 4023

GRANGE OIL COMPANY OF LINN AND BEN-
TON COUNTIES, a Co-operative Corporation,
Plaintiff,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan Corpora-
tion,

Defendant.

Portland Oregon, Friday, May 28, 1948

Before: Honorable Claude McColloch, Judge.

Appearances: Mr. Mark V. Weatherford (Weath-
erford & Thompson), and Mr. Hugh L. Biggs
(Hart, Spencer, McCulloch & Rockwood), Attor-
neys for Plaintiff. Mr. James K. Buell and Mr.

Earl Nelson (Griffith, Peck, Phillips & Nelson),
Attorneys for Defendant.

TRANSCRIPT OF PROCEEDINGS OF TRIAL

Mr. Biggs: If your Honor please, we have prepared a pre-trial order which I think is now complete in all respects, but the draft of it was just given out before we came to court and I am not sure that counsel has had a chance to check all the provisions. [1*] It may be an expeditious way to proceed to start with the draft of the pre-trial order which would serve as an opening statement to your Honor unless you would rather we would take a few minutes longer between ourselves.

The Court: I have read the pleadings. Go ahead and put on your testimony.

Mr. Biggs: Very well.

Plaintiff's testimony:

M. J. LOONEY

was thereupon produced as a witness on behalf of plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weatherford:

Q. State your name, please, Mr. Looney.

A. M. J. Looney.

Q. Where do you live?

A. Five miles south of Albany, just off the 99-E highway.

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of M. J. Looney.)

Q. What is your age? A. Fifty-six.

Q. What is your occupation? A. Farmer.

Q. How large a farm do you operate?

A. 800 acres.

Q. What position, if any, did you hold with the plaintiff, the [2] Grange Oil Company of Linn and Benton Counties, a co-operative corporation?

A. I am president of the board of directors.

Q. How many members are on the board of directors? A. Six.

Q. What occupations do they follow?

A. All farmers.

Q. And they live where?

A. In different sections of Linn and Benton Counties. The organization covers both counties.

Q. How many members do you have in the co-operative? A. 1700, about.

Q. What is the general purpose of the co-operative?

A. For mutual benefit in marketing crops and seed and feeds.

Q. In operating that business, what kind of business, if any, do you engage in?

A. A mill in Benton County, Oregon, and feed and seed business.

Q. What is the nature of the seed business?

A. The processing of seed; that is, as it comes from the farm, and cleaning it, and getting it ready for marketing purposes—rye grasses, vetches, clovers and fescue grasses, and all different types of seed and grains that are produced in this section—white oats and barley as well.

(Testimony of M. J. Looney.)

Q. What buildings did you use for that purpose?

A. Had three buildings, one that we had the office in, and [3] another that was a kind of a warehouse, and another a storage warehouse.

Q. What time of year would the seeds come into the building?

A. They usually start, the first seeds, right after the Fourth. English rye grass is the first seed.

Q. The Fourth of July?

A. Right after the Fourth of July.

Q. Then how long does it continue? First, what is done with the seeds when they come in?

A. The farmers haul their different crops in; then they are put through cleaners and cleaned and processed, sacked and made ready for the market.

Q. How long, ordinarily, does the operation continue from July 4th on through the rest of the year?

A. It takes pretty well up in late November by the time the crops are usually cleaned up, or even up to the first of the year.

Q. Before it is all shipped out?

A. Before it is all shipped out.

Q. And frequently a good deal later?

A. It is not all sold by that time. What I mean is, that the farmers generally have their crops cleaned by that time, but it isn't all sold or shipped, and runs into the next year.

Q. In the cleaning operation, just state in what condition the crops come to your warehouse?

(Testimony of M. J. Looney.)

A. Well, for instance, common rye grass is sowed with hay and [4] vetch and it makes a mixture of hay, vetch and rye grass, and then it is cleaned and separated and brought up to the required standards before shipping to markets in the other countries.

Q. Are other seeds mixed, also?

A. Yes, all types of seed more or less are intermingled. That is, the fescue will have rye grass with it and will have to be separated and the clovers will have foul stuff in the clover, such as sorrel, buckhorn and mustard.

Mr. Buell: I do not see, your Honor, how that line of testimony has any bearing on this particular case. It is going into the nature of the farming business rather than the claim on the warehouse.

Mr. Weatherford: I have finished the line of questioning that I intended, your Honor. I am simply showing the nature of the business, in general, that they were engaged in and work that was required and so forth, in order to show that the mistake was not willful. We claim that it was an inadvertence. I wish to show the nature of the business, which will be borne out by other witnesses, to show that the managers were pretty well occupied in handling this type of business.

Q. How often would your board of directors meet? A. Met once a month.

Q. How did you handle the management of this Monroe warehouse and business?

(Testimony of M. J. Looney.)

A. Hired a manager by the year and he carried on the business. [5]

Q. Were the details of the business up to him, and the marketing and so on?

A. Yes, we just checked the reports monthly and checked on the business.

Q. With reference to the handling of insurance——

A. That was up to the manager at all times.

Q. What was the policy of your co-operative with reference to carrying full insurance on all merchandise?

Mr. Buell: Object to that, your Honor, as immaterial and irrelevant as to what their policy was. The question is what insurance they had at the time of this loss.

The Court: Answer, subject to the objection.

(Question read.)

A. We expect the manager to have everything fully covered at all times in the co-operative, and all interests.

Q. (By Mr. Weatherford): When did you or the other members of the board, as far as you know, discover the error on the report that was made by the manager in this case?

A. The first I knew of it—I don't remember the date, but it was after the time we met in your office.

Q. Was that before or after the fire?

A. That was after the fire.

(Testimony of M. J. Looney.)

Q. Do you know whether it was soon after the fire or a considerable time?

A. Well, it was some little time after we was notified—Of [6] course, we had notification of the fire right away but we didn't know anything about the coverage of the insurance until we met with you in your office.

Q. Had there been some adjusters there at that time, the time that you had the meeting, adjusting the loss?

A. I couldn't say on that point.

Q. You don't recall? A. No.

Mr. Weatherford: We will offer in evidence the insurance policy, your Honor, No. 133021.

The Court: Do you have a lot of exhibits?

Mr. Weatherford: Yes.

The Court: Put them all in.

Mr. Weatherford: We offer all the exhibits that we have, No. 1 to No. 16, inclusive.

Mr. Biggs: Shall we take the time to mark them now?

The Court: The Reporter will mark them later. He will give them the same numbers as they are marked as pre-trial exhibits.

(Plaintiff's Pre-Trial Exhibits were thereupon received in evidence and marked as Trial Exhibits, as follows:)

PLAINTIFF'S EXHIBITS

1. Insurance Policy No. 133021 issued by Defendant to Plaintiff.

(Testimony of M. J. Looney.)

2. Letter dated August 20, 1946, from The Mill Mutuals [7] to Grange Oil Company.

3. Letter dated October 2, 1946, from The Mill Mutuals to Monroe Feed Store.

4. Letter dated February 11, 1947, from the Mill Mutuals to Grange Oil Company.

5. Copy of letter dated February 18, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Insurance Company.

6. Document entitled "Sworn Statement in Proof of Loss," proposed proof of loss submitted by Defendant to Plaintiff.

7. Carbon copy of letter dated March 10, 1947, from Mark V. Weatherford to Michigan Millers Mutual Fire Insurance Company.

8. Carbon copy of proof of loss submitted to Defendant by Plaintiff.

9. Letter dated March 11, 1947, from The Mill Mutuals to Mark V. Weatherford.

10. Letter dated April 14, 1947, from The Mill Mutuals to Grange Oil Company.

11. Carbon copy of letter dated April 24, 1947, from Grange Oil Company to The Mill Mutuals.

12. Letter dated May 8, 1947, from The Mill Mutuals to [8] Grange Oil Company.

13. Carbon copy of letter dated June 12, 1947, from manager of Grange Oil Company to The Mill Mutuals.

14. Letter dated May 19, 1947, from law offices of Shank, Belt, Rode & Cook to Messrs. Weatherford & Thompson.

(Testimony of M. J. Looney.)

15. Carbon copy of resolution of board of directors of Grange Oil Company, bearing date of May 28, 1947, unsigned.

16. Tabulation of figures bearing heading "Grange Oil Company of Linn and Benton Counties, Monroe, Oregon; Fire; January 9, 1947."

Mr. Buell: Does the Court wish objections to any exhibits to be stated now?

The Court: You may state your objections during the recess or at any time during the trial, and the exhibits will all be admitted subject to whatever objection you may have to offer.

Mr. Weatherford: I think that is all the questions we have of this witness.

Mr. Buell: No questions.

(Witness excused.) [9]

VERNON C. JONES

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Weatherford:

Q. State your name, please.

A. Vernon C. Jones.

Q. What is your age?

A. Fifty-five.

Q. Where are you living now?

A. In Eugene.

(Testimony of Vernon C. Jones)

Q. Where were you living in 1946 and 1947, and prior thereto? A. Corvallis.

Q. What position, if any, did you occupy with the Grange Oil Company during the year 1946 and the year 1947?

A. I was manager of the Monroe Feed Store, and secretary and treasurer.

Q. When did your relationship cease?

A. On October 1st, 1947.

Q. State briefly the type of business that you conducted there for the plaintiff at Monroe?

A. Well, we were a co-operative cleaning warehouse and also a feed business. We would take seeds in from the farmers, weigh them up, give them a lot number and store them, and then process them or clean them later. The volume of business was around [10] \$600,000 a year that we did.

Q. When would the cleaning start?

A. It was almost continual with that particular warehouse. The capacity of our cleaning equipment was not equal to take care of the volume of seeds that we had brought in; took practically the full year. There would be our rush season when they would come in and then we would store and clean through the winter.

Q. What did you have in the way of cleaning equipment?

A. We had three cleaners, spirals, and other machinery for cleaning various seeds. There is a considerable difference in the type of machin-

(Testimony of Vernon C. Jones.)

ery. We had cleaning machines, agitators of different kinds, all different kinds of machines.

Q. What is the fact as to the operation of those machines as to requiring skill and constant supervision?

A. Well, there isn't any two farmers' seed that cleans alike. Your machine has to be continually changed. When you change lots you change the machine. Naturally, they have to be looked over.

Q. What is your experience in superintending and operating that type of machinery?

Mr. Buell: Object to that.

Q. (By Mr. Weatherford): Are you skilled at it?

Mr. Buell: We object to that line of testimony, your Honor. There is no issue here as to whether or not there was any intent to defraud on the part of the plaintiff, and I don't see how this testimony with regard to the nature of the cleaning and [11] processing of seeds bears on the construction of this policy of insurance.

The Court: He may answer, subject to the objection.

(Question read.)

A. Well, I have had a great many years' experience with machinery of that type, all types, in fact.

Q. (By Mr. Weatherford): What is the fact as to the situation regarding help during the year that this controversy arose?

A. Very hard to get help that was efficient.

(Testimony of Vernon C. Jones.)

Q. What was the situation as to the cleaning business itself? What attention did you have to give to it as superintendent and manager of the business?

A. Well, I had to practically watch over a lot and inspect the lot as it was being run.

Q. What other duties did you have with reference to receiving the crops from the various farmers?

A. Well, we had the selling end of it. We sold the seeds and took care of the shipping—management of the office.

Q. How about keeping the crops separate as to each farmer, the lots of seed?

A. Well, that is pretty hard to do; just got to be up on your toes and watch all the time. The cleaning men that operate the cleaners, cleaning a certain number of sacks, they might leave a few sacks in that lot that might get placed off separately and left and naturally the man would not have all of his seeds [12] cleaned. You had to be real careful to keep these lots separated during the wintertime. From the cleaner, each bag is marked with the man's number on it and stored separately—goes to the fumigator first on the vetches, and then stored in the warehouse.

Q. What is the purpose of the fumigation?

A. To kill the weevil in the grain.

Q. Did you also have charge of the insurance?

A. That is right. I had charge of all insurance to start with, and then instructed our employees,

(Testimony of Vernon C. Jones.)

our bookkeepers, to keep the inventory up and report.

Q. In your office how many employees did you have?

A. We had three besides myself.

Q. Who were the employees?

A. Miss Gilder, Mrs. Roach and Mrs. Miller.

Q. What part of the insurance business did Miss Gilder have to do with?

A. She naturally took care of the inventory and she reported, made the reports for me to sign; but if it came to raising the insurance, or if our inventory raised it, then I advanced our insurance. I would call and advance the insurance.

Q. How would you communicate that to the insurance agents?

A. By telephone.

Mr. Buell: Which insurance agent are you referring to?

Mr. Weatherford: I said "agents." I mean of the insurance [13] companies that you did business with.

Q. Who were the agents that you talked with?

A. With the Sun and Home, Jack Porter in Corvallis, and with The Mill Mutuals, Mr. Sankela of Seattle, and also Mr. Brockman—I don't remember the name. I can't say the name. I called and ordered insurance raised as the seed came in.

Q. Well, this letter from The Mill Mutuals, introduced in evidence as Plaintiff's Exhibit No. 2, under date of August 20, 1946, was that the result

(Testimony of Vernon C. Jones.)

of your first telephone conversation with The Mill Mutuals?

A. That was the result of a telephone conversation. I don't know if it may be the first, but it is the result of a telephone conversation.

Q. With whom? The one who signed the letter?

A. Yes, I believe the one that signed the letter.

The Court: What is the name on it?

Mr. Biggs: We haven't got the exhibit right here before us. Do you remember what the name of that gentleman is? It is Exhibit No. 2.

The Court: He is having trouble with the name. Somebody help him out on the name.

Mr. Biggs: Sankela is the author of the letter.

Q. (By Mr. Weatherford): How do you pronounce the name? A. Sankela.

Mr. Biggs: Sankela, if I am correct. [14]

A. Sankela. I don't pronounce the name the same as you do.

Q. (By Mr. Weatherford): During the year after that letter, did you have numerous telephone conversations with this gentleman, Mr. Sankela, over the telephone?

A. No. He was a pretty hard man to get hold of. I couldn't always get him, I will say that. He is a pretty hard man to get hold of, but we got someone in the office usually; but what the name was I won't say. I can't.

Q. Likewise with the other agent, Jack Porter?

A. That is right, with Jack Porter.

Q. What did you do if you wanted to raise the insurance with Jack Porter?

(Testimony of Vernon C. Jones.)

A. I would just go to the telephone and call up and tell him I wanted certain insurance on a certain warehouse, at the flax warehouse, No. 1 or 2. That is the way I did.

Q. By telephone? A. Yes.

Q. How long after the telephone conversation would you receive written evidence of the raising or lowering of your insurance?

A. Well, anywhere from a week or ten days, sometimes might be longer.

Q. How long did you number your buildings so as to identify them, the buildings that you were doing this business in?

A. I believe that was done by the former manager before I came in there. [15]

Q. How were they classified?

A. No. 1 and 2, and then we had one that was a red barn. We called it the hay barn, and we had certain storage in there, and we had certain storage in the Southern Pacific freight depot; we had storage, over a thousand ton of seed, at the flax plant during this time, around a thousand tons of seed, close to it.

Q. Where did you receive the seed, most of it?

A. Most of it was received at No. 1 warehouse and then directed to No. 1 or No. 2, depending on the seed, what variety.

Q. Did you make any raise in insurance there, and, if so, about when, with the companies represented by Jack Porter?

(Testimony of Vernon C. Jones.)

A. Took over the management on the 1st day of January, 1945, I believe—1946, that would be—and when the audit of the books was completed, which was somewhere around the 25th of January, the inventory showed \$130,000 worth and they had coverage with The Mill Mutuals of up to \$100,000, and the manager, the previous manager, was there, and I asked him if that was the proper amount of insurance, that I considered that it was low, and that we should get more if we could get it from The Mill Mutuals, and then I called Porter somewhere around between that and the 1st of February, and we got \$25,000 on No. 1 and \$25,000 on No. 2 buildings, the contents of the buildings, I should say.

Q. That is, the merchandise and seed in the buildings? [16]

A. That is right.

Q. Would that be constant now, that insurance? Was that constant? Did you always keep that amount?

A. With Mr. Porter we would keep that \$25,000 on either building continuously, as long as we were there.

Q. Did you raise that insurance or attempt to raise it at any time?

A. I did.

Q. When?

A. Somewhere in August, I would say.

Q. What year?

A. 1946.

Q. How did you raise it? What was your means of communication?

A. Telephone.

Q. With whom?

(Testimony of Vernon C. Jones.)

A. I meant to say Mr. Porter.

Q. Personally, or with someone in the office?

A. Oh, I couldn't say to that. Possibly it was the office help. I can't remember whether it was Mr. Porter or an office worker.

Q. What did you direct or request in the way of insurance?

A. I requested \$25,000 on either building, on No. 1 and No. 2.

Q. That is, a total of \$50,000?

A. \$50,000, that is right. Then we made up these reports to The Mills Mutual; Miss Gilder did. [17]

Q. What did you tell her?

Mr. Buell: Just a moment, for the record. We would like to have Mr. Porter identified in the record as to what companies he represented.

Mr. Biggs: I think we might stipulate, the Sun and the Home.

Mr. Buell: And that he had nothing whatsoever to do with the defendant, The Mills Mutuals.

Mr. Biggs: I think that is correct.

Mr. Weatherford: Yes.

Q. What companies did Jack Porter represent?

A. The Home Insurance Company and the Sun Insurance Company. He represents more, but those two——

Q. What caused you to call up his agency to increase this insurance by \$25,000 on No. 1 and by \$25,000 on No. 2?

(Testimony of Vernon C. Jones.)

A. Our inventory raised, more grain in, more seeds.

Q. Then, after you had this telephone conversation, did you report to Miss Gilder, or was she there in your hearing when you made the order?

A. Well, I would say she was there. She was there every day and the telephone was on the desk, and her desk was across from there. I reported that we had another \$25,000 on each building.

Q. What is the fact about your good faith in believing that you did have \$25,000 additional insurance at that time on Warehouse No. 2?

A. Well, we naturally believed we had and we reported it that [18] way.

Q. You reported to The Mill Mutuals that you did have that additional \$25,000 on them, which would have made \$50,000 on No. 2?

A. That is right.

Q. Who reported to you that the inventories required additional insurance?

A. Miss Gilder.

Q. Who made up the report that you sent to The Mill Mutuals stating that you did have \$50,000 on No. 2?

A. I would say Miss Gilder.

Q. Did you sign those reports?

A. I signed them, always.

Q. Did you send these reports in continuously from the time you made the raise in the insurance, as a matter of fact—

A. Yes.

Q. From the time of this telephone conversa-

(Testimony of Vernon C. Jones.)

tion in the summer of 1946 until the time of the fire, each month? A. Yes.

Mr. Buell: According to the pre-trial conference, the report for November was the last report made prior to the fire?

Q. (By Mr. Weatherford): Then, until the November report? A. Yes.

Q. During all that time, what did you actually believe was the amount of insurance that you had from Jack Porter's companies, [19] the Sun and the Home, or either of them, on this Building No. 2, the contents of Building No. 2?

A. \$50,000.

Q. When did you discover it was less than that amount?

A. I believe Mr. Sankela mentioned it to us first after the adjustment was made, I believe, or at that time.

Q. You mean after the fire?

A. After the fire.

Q. Mr. Sankela, of the defendant, The Mill Mutuals? A. Yes.

Q. State the circumstances under which he told you?

A. Well, he mentioned that he didn't know—that we only had \$33,330 on there, and we thought we had \$50,000, with Mr. Porter, with the Sun and the Home, and he didn't know what his company would do about that. I believe that was the words, as I remember, he said.

Q. Was he one of the adjusters?

(Testimony of Vernon C. Jones.)

A. That is right. Mr. Sankela was one of the adjusters.

Q. Mr. Sankela represented what company?

A. The Mill Mutuals or Michigan Millers.

Q. Who represented the Sun and the Home companies? A. Mr. Moe.

Q. Did the two of them work together?

A. That is right.

Q. You reached an adjustment as to the amount and value of the [20] contents of that building that was lost by fire, No. 2? A. That is right.

Q. After that was done, you say this conversation occurred? A. That is right.

Q. What did you do then?

A. If I remember right, it was late in the evening and, as soon the next morning as I could—These policies were in the bank vault at Monroe. As soon as I could, I got those and went to Porter's office to see whether we were short or whether we had \$50,000 on it.

Q. What else did you do after you went to Porter's office?

A. Well, I believe I contacted Mr. Weatherford, was the next step I did on it.

Q. That same day?

A. I think that same day. I am not sure. Yes, that same day.

Q. Was that the first time you actually knew that you did not have \$50,000?

A. That is right.

(Testimony of Vernon C. Jones.)

Q. And only had how much?

A. \$33,300 from the Sun and the Home—\$33,330 is what it was actually.

Q. In your business there, were there a number of insurance policies that came under your management? A. About seven.

Q. All different types of insurance? [21]

A. That is right.

Q. What is the fact about endorsements of various kinds being received by you on those various policies?

A. I don't understand that, Mr. Weatherford.

Q. Well, I am asking whether the insurance companies sent you endorsements to go on these policies? A. Yes, they did; that is right.

Q. Endorsements of various kinds?

A. That is right.

Q. When they came, what did you do with them?

A. Well, we used to have to go and get the policy.

Q. What?

A. We used to have to go and get the policy—Lots of times, maybe, that wasn't done for a day or two after they came—and attach them to the policy.

Q. Who did the attaching?

A. Miss Gilder, the bookkeeper.

Q. The policies, you say, were kept in the bank vault? A. That is right.

Q. Did you, in the conduct of your business, pay much attention to these endorsements when they came?

(Testimony of Vernon C. Jones.)

A. Didn't have the time. No, I didn't pay much attention. I couldn't.

Q. After this error was discovered, you found these policies Jack Porter had sent to you, sent to your company? [22] A. That is right.

Q. Had you ever read them or known the contents of them prior to the time that you have mentioned, after the fire?

A. I don't remember of reading them.

Q. If you had read them, you would have discovered the mistake, would you not?

A. That is right.

Mr. Nelson: That is objected to, your Honor, what he might have discovered when he had them there and could read them.

The Court: That is stricken.

Mr. Nelson: What is that, your Honor?

The Court: Stricken.

Q. (By Mr. Weatherford): Are you very familiar with insurance? A. I am not.

Q. This provisional insurance, so-called, in The Mill Mutuals, requires some audit or classification of your valuation and your stock on hand?

A. Yes, sir.

Q. Does it not? A. Yes, sir.

Q. What is the fact at the end of the year as to whether your company is audited or not?

A. The books are audited by our company the first of the year, by the auditor.

Q. Is that an independent auditor?

A. An independent auditor, that is right. [23]

(Testimony of Vernon C. Jones.)

Mr. Buell: What sort of an audit was made and when?

Mr. Weatherford: I am just showing that all of their business is audited every year, and then I was going to follow that up by showing if there had been a mis-valuation any time it would have been revealed in that audit; or if there was a mistake in the valuation or in the insurance, it would then have been discovered.

Mr. Buell: You mean an audit had been made?

Mr. Weatherford: No. I am maintaing that had not been made at the time of the fire. The fire occurred January 9th. It would have been made before the anniversary of the policy, which was in May.

Mr. Buell: It seems to me we are concerned with what has been done.

Mr. Weatherford: As to their method of doing business.

Mr. Buell: Not what might have been done.

Mr. Weatherford: I am trying to show their method of doing business, that is, the way they handled it.

Mr. Buell: If an audit was ever made, that audit is the best evidence of what is covered and what it would disclose and would not disclose.

Mr. Weatherford: We don't have it for this year.

Mr. Buell: I object to any testimony on the part of the plaintiff with regard to an audit.

(Testimony of Vernon C. Jones.)

Mr. Biggs: May I be heard one minute? [24]

The Court: Yes.

Mr. Biggs: The contention is made in the pre-trial order that the only possible information the company could have as a basis for adjusting its premium at the end of the year, the determination of the final premium, would be——

The Court: What company?

Mr. Biggs: The Mill Mutuals, the defendant in this case—was the interim report made by the plaintiff, the insured.

The Court: Whose contention is that?

Mr. Biggs: That is the defendant's contention in this case. They have said they were dependent solely on the interim reports that we made, and we want to show, in the normal course of business, that they would have had all this information given to them, and I think their policy in fact requires them to make an audit from the books at any time, to satisfy themselves.

Mr. Buell: The policy, your Honor, will speak for itself as to whether or not an audit is required and whether or not the defendant has the power to go in of its own accord and make an audit. The policy will disclose that there is no such provision.

The Court: He is just showing how he made his mistake.

Mr. Buell: He is showing how he made his mistake, but they are going to try and show that they would have picked up the error and we submit they

(Testimony of Vernon C. Jones.)

are not entitled to do it because it is in the nature of self-serving evidence.

The Court: Go ahead. [25]

Mr. Nelson: Of course, we do not have the audit here at all.

Q. (By Mr. Weatherford): What was the scope that you customarily followed or that was customarily followed by the auditor? What did he audit?

A. He audited the records entirely. He audited everything from the start of the year through.

Mr. Buell: Could we have a continuing objection to any testimony on the part of the plaintiff as to an audit?

The Court: How could he audit a telephone conversation?

A. Couldn't audit a telephone conversation; he couldn't, but he audited our records completely.

Q. (By Mr. Weatherford): For the year 1946 had that audit been started or completed?

A. It had not been started.

The Court: What is your testimony going to be as to why he did not get this insurance?

Mr. Weatherford: Only that the clerk misunderstood his order.

The Court: Porter's clerk?

Mr. Weatherford: Yes.

The Court: Are you going to produce the clerk?

Mr. Weatherford: We did not intend to. We admit they in good faith understood it as only \$25,000.

The Court: Porter? [26]

(Testimony of Vernon C. Jones.)

Mr. Weatherford: Porter's people, and they sent an endorsement, as they understood it, which was not seen by Mr. Jones, and that is all the evidence we will have on the subject.

Q. You were in my office at the time the board of this Grange Oil Company met, at the various times when they considered this controversy with The Mill Mutuals, were you not? A. Yes.

Q. And heard all these conversations and participated in them? A. Yes.

Q. And were you present when letters were written to The Mill Mutuals?

A. That is right. And later at the time the \$70,000 was paid.

Q. Do you remember the letter wherein we tendered the company an additional premium, if any? You were present when that letter was written?

A. That is right.

Q. I will get the number of the exhibit in a minute.

Mr. Biggs: I think it is Plaintiff's Exhibit No. 13.

Q. (By Mr. Weatherford): All right. Plaintiff's Exhibit No. 13, dated June 12, 1947, to The Mill Mutuals, and signed by yourself as manager of the Grange Oil Company, and in which it is stated "And we hereby tender you the full amount of the premiums on the actual risk which we claim you carried." Were you present when that letter,

(Testimony of Vernon C. Jones.)

dated June 12, 1947, was written and signed by you? A. I was. [27]

Q. At that time was the money available for the Grange Oil Company to pay it?

A. That is right, yes.

Q. At that time did you know what the actual amount of the premium for the risk that you claimed was carried was, amounted to?

A. No, I didn't.

Q. Or did you have any way of knowing that?

A. I had no way of knowing.

Q. At the time of the institution of the suit or the action in this case was the money available?

A. It was.

Q. And it is still, at this time?

A. It is still, at this time, yes.

The Court: Did Porter's company recognize this insurance?

Mr. Weatherford: Porter's company paid all the insurance that they actually wrote.

Mr. Biggs: Didn't pay the additional, no, your Honor.

The Court: They denied liability?

Mr. Weatherford: Yes. That was paid immediately, all of their insurance.

The Court: They deny liability on this insurance, that he says he put through on the telephone.

Mr. Weatherford: Yes.

Mr. Biggs: The order was for \$50,000, and they put in for [28] \$25,000 on each of the two buildings, and there is \$25,000 that they recognize they

(Testimony of Vernon C. Jones.)

were liable for. I just wondered if we made that clear to your Honor.

The Court: In other words, this case is being tried on the assumption that you didn't get the insurance until this telephone call.

Mr. Biggs: That is correct, didn't get the \$25,000.

Mr. Weatherford: And in this case there is \$16,000 odd which the defendant claims we were carrying ourselves.

The Court: I understand.

Mr. Weatherford: And we claim it was an inadvertent error and of that \$145,000 they have only paid \$70,000.

The Court: Of course, you could have sued on another theory for the additional \$25,000.

Mr. Weatherford: Yes, we might have, unless we had been estopped by his actually sending the receipt that we overlooked.

The Court: Your theory is that he probably made a mistake.

Mr. Weatherford: That is right.

The Court: Your theory here is that you made the mistake.

Mr. Weatherford: No. Our theory is that Porter made the mistake, and the mistake was made and——

The Court: All right. Your theory is that everybody made mistakes.

Mr. Weatherford: Well, we made the mistake of not seeing and catching Porter's mistake. [29]

(Testimony of Vernon C. Jones.)

The Court: All right.

Mr. Biggs: That is right.

The Court: I still say you could have sued Porter and tried to hold him on the \$25,000 on the telephone call.

Mr. Weatherford: Yes.

The Court: I don't say "hold him." I said "try to hold him."

Mr. Weatherford: I believe that is all the questions I have.

Cross-Examination

By Mr. Buell:

Mr. Buell: I want the record to show the apportionment of that second \$25,000 issued by Porter is \$16,000 to No. 1 and \$8,000 to No. 2.

Mr. Biggs: I think that is all covered by the pre-trial order. I think it is only restating what is in the pre-trial proceedings, and that is precisely what the situation is as to that insurance, your Honor. Prior to that telephone call that the witness made in August, 1946, there was a policy of \$25,000 on each of the two buildings. He ordered \$25,000 additional on each building. Porter's clerk accepted this as \$25,000 on both buildings. This additional \$25,000 was divided, for some reason about which I have not yet been informed. I don't know whether Mr. Porter could help us with that or not. We have a call in for him now. It was divided, one-third on one building and two-thirds on the other, so that, instead of \$25,000 or-

(Testimony of Vernon C. Jones.)

dered for [30] Building No. 2, only \$8,333 additional insurance was placed on Building No. 2. The specific insurance was but \$33,000 instead of \$50,000 which the Grange Oil Company thought they had. I think those were all stipulated facts.

Q. Miss Gilder and Mrs. Roach and Mrs. Miller did all the work in the office, is that right?

A. Yes.

Q. They did not work out in the seed-cleaning part of the business?

A. Mrs. Roach, during the busy season, sometimes. The other two worked in the office.

Q. Did Miss Gilder have general charge of the office work? A. That is right.

Q. Was she your bookkeeper also?

A. She was the head bookkeeper for the company.

Q. In so far as the running of the office was concerned, during the busy period, you relied on Miss Gilder and on the reports that she gave you to sign? A. Yes.

Q. Do you have any record of when you received the endorsement or rider from Mr. Porter's office as a result of your ordering of additional insurance in August?

A. I couldn't say that I could give you the exact date; some time in August.

Q. In other words, the rider got there some time in August? A. What is that? [31]

Q. The rider or endorsement came into your office some time in August?

(Testimony of Vernon C. Jones.)

A. I couldn't say the date it came in.

Q. You think the insurance policies themselves were kept in the bank? A. That is right.

Q. In the vault? A. That is right.

Q. I believe you also testified as the endorsements came in they would eventually be taken down to the bank? A. Yes.

Q. And affixed to the appropriate policy?

A. Yes.

Q. When you went to the vault after the loss to pick up the policies issued by the Sun and Home companies, was the last endorsement attached to those policies?

A. I don't remember.

Q. When you went to the vault to pick up those policies, didn't you check to see how much insurance there was? A. I did.

Q. You found that there was only \$25,000 and \$8,333 in there? A. Yes.

Q. So the endorsement was on the policy at the time?

A. It must have been. The policies were in a box. I wouldn't say they were on the policies, attached to them. [32]

Q. But they were in the vault? A. Yes.

Q. Did any particular person take those various endorsements over to the vault?

A. I did.

Q. You did? A. Yes.

Q. You took them all over? A. Yes.

Q. Did Miss Gilder ever take any over?

(Testimony of Vernon C. Jones.)

A. No.

Q. Do you still have those policies in your possession?

A. We don't. We returned them.

Q. Returned them to the Sun and Home?

A. Yes.

The Court: I thought he didn't have anything to do with the insurance or putting endorsements on the policies. Didn't he just say so? He took them over to the bank.

Mr. Buell: He did, yes, your Honor.

The Court: Do you get the point?

Mr. Biggs: I do. I wonder if the witness has made an error.

A. Any mail that comes in—any policies that come——

Mr. Biggs: That is not the point of the Court's remarks. Did you say a moment ago that Miss Gilder took care of the [33] insurance and took the insurance riders down to the vault?

A. No.

Mr. Biggs: Pardon.

A. My intentions were not that way.

Mr. Biggs: Did you make that statement?

A. I didn't make the statement because my intentions are that I opened the mail on the desk, and she gets the information off her books, usually, and she took care of the bank deposits for us; it was personal bank books. It didn't belong to the company.

The Court: In other words, he had this endorse-

(Testimony of Vernon C. Jones.)

ment at one time and took it over to the bank.

Mr. Biggs: That is correct.

The Court: But she made some entry someplace.

Mr. Biggs: Tell the Court what Miss Gilder did with respect to the entries on the records of the defendant.

A. She reported to The Mill Mutuals that we had \$50,000.

Mr. Biggs: From what information? From what source did she get the information to enable her to make the entries and the report? I thought we could save some time here, your Honor.

The Court: Let him continue with his examination.

Mr. Biggs: All right.

Q. (By Mr. Buell): Then we have gotten this far, that some time between August and prior to January 19th you took the endorsements that were issued by the Sun and Home to the bank and put them in the bank box? [34] A. Yes.

Mr. Biggs: Answer aloud. It is hard for the Court to understand.

A. That is right.

Mr. Biggs: And it is hard for the lawyer's to understand, if you do not speak up.

A. Yes. Pardon me.

Q. (By Mr. Buell): Do you recall when you took that particular endorsement over?

A. No.

(Testimony of Vernon C. Jones.)

Q. You said that you personally opened the company's mail as it came into the office?

A. That is right.

Q. That was every day? A. Every day.

Q. And you read the mail before turning it over to Miss Gilder? Is that right?

A. Yes, my mail.

Q. From time to time, as you received these various endorsements for your different fire insurance policies, through the mail, what did you do with them; that is, the day that they came into the office?

A. Usually turned them over to Miss Gilder to record; usually was a statement with the premium on it and she wrote the checks out for those. [35]

Q. Then would she give them back to you to take over to the bank? A. Yes.

Q. Did you make a practice of keeping a journal or a ledger showing the amount of insurance that you had in effect at any particular time?

A. We did have.

Q. What sort of a ledger did you keep there? During that time, I mean?

A. You will have to ask the bookkeeper. I am not a bookkeeper. What type of a ledger it was I wouldn't know.

Q. Do you ever examine the ledger?

A. Occasionally.

Q. After this loss did you examine the books of your company to determine when this policy

(Testimony of Vernon C. Jones.)

or endorsements of the Sun and Home were posted in your books?

A. I examined a copy of the report to The Mill Mutuals.

Q. Did you keep copies of the monthly reports of values that you sent to the Michigan Millers Mutual? A. Yes.

Q. Referring to the reports of actual cash values, did your office keep carbon copies of those reports?

A. I believe we did. I am pretty sure we did.

Mr. Buell: I have no further questions. [36]

Redirect Examination

By Mr. Weatherford:

Q. Concerning the insurance, the handling of insurance, who prepared the data for your valuations? A. Miss Gilder?

Q. Miss Gilder? A. Yes.

Q. Is that what you had in mind a while ago?

A. That is right. That is what I had in mind.

Q. With reference to the policy itself, you handled that?

A. Well, yes, I took care of the policies, that is right; took them to the bank vault and put them away.

Q. Do you know of any reason, when you got these endorsements, why you did not notice them if they were less than the \$25,000?

A. I don't know no reason why I overlooked it.

Q. But did you, as a matter of fact, know that it was not \$25,000 as you had ordered?

(Testimony of Vernon C. Jones.)

A. No, I didn't know but what it was \$25,000—\$50,000, it would have been; \$25,000 and \$25,000,—That is what I thought it was, and we entered it in the books that way, reported to The Mills Mutual that way and continued to report.

Q. At that time were you busy with the operation of your mill? A. Yes.

Q. What is the fact about any endorsements from the insurance companies? Did you pay any particular attention to them after [37] they came?

A. Just a rubber-stamp manager, is all.

Q. What?

A. The manager is just a rubber stamp. He can't attend to all details of everything.

Mr. Weatherford: I believe that is all.

Recross-Examination

By Mr. Buell:

Q. You knew that these reports of actual cash values were the basis upon which the defendant computed the premium that they arranged on the policies that they had issued to your company?

A. I did not.

Q. Did you ever read through these reports that you made?

A. I don't suppose I ever did.

Q. Do you recall ever reading this statement: "We understand that if the average of the values entered in this statement is less than the average of actual cash values for the same days for which this statement is filed, the difference, in case of loss, shall be deducted from the actual cash value

(Testimony of Vernon C. Jones.)

at the time of such loss, and the remainder (after deducting non-provisional insurance, if any) shall constitute the actual amount of insurance in force under all policies covering under the provisional form.”

You do not recall ever reading that?

A. I do not.

Q. You did, however, know you were supposed to report the [38] amount of specific insurance which you had on the various risks?

A. I don't understand that question.

Q. Did you know in this report you were reporting the amount of non-provisional insurance or specific insurance that you had on your various warehouses, No. 1 and No. 2, and the others you have described?

A. Yes, we realized that it was—that the report covered that.

Q. Do you recall ever reading the red print in large letters in the lower left-hand corner of the report that states “Under-reporting means under-insurance”?

A. I don't remember of reading it.

The Court: This was not a case of under-reporting or over-reporting.

Mr. Buell: Over-reporting of the specific insurance in effect and under-reporting of the values covered by the provisional policy. I have no further questions.

(Testimony of Vernon C. Jones.)

Redirect Examination

By Mr. Weatherford:

Q. Throughout your lifetime have you had—
Before you got into this kind of work, had you
ever had anything to do with provisional insurance?

A. Yes. We had it with the flax plant. We operated the Monroe-Benton County flax plant, and it was covered by six or seven policies. [39]

Q. And you made these same kinds of reports?

A. That is right.

Mr. Weatherford: That is all.

(Witness excused.)

FLORENCE E. GILDER

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. State your name in full for the record.

A. Florence E. Gilder.

Q. That is Miss Gilder, is it? A. Yes.

Q. Where do you live, Miss Gilder?

A. Corvallis.

Q. How long have you lived in Corvallis?

A. About twelve years.

Q. What is your occupation?

A. Bookkeeper.

Q. I am sorry. I didn't hear.

(Testimony of Florence E. Gilder.)

A. Bookkeeper.

Q. By whom are you employed, Miss Gilder?

A. At the present time?

Q. Yes. A. The Grange Oil.

Q. How long have you been employed by the Grange Oil? A. Since January 1, 1946.

Q. Prior to that time by whom were you employed?

A. Benton County Flax Growers Association.

Q. Is that the predecessor-in-interest to the Grange Oil? A. No.

Q. Or an associate or affiliate of any kind?

A. No.

Q. What were your duties as bookkeeper at the Grange Oil?

A. At the present time I am taking care of——

Q. I am speaking more particularly of the time involved in this lawsuit, from January 1, 1946, around to January 25, 1947.

A. I took care of their accounts receivable, inventories, reporting the insurance and all customary books.

Q. Speak louder.

A. The general ledger.

Q. The general ledgers?

A. That is right.

Q. When you went to work there January 1, 1946, what did they have, if you can recall, in the way of any insurance record or ledger?

A. They didn't have very much of any kind of a record. [41]

(Testimony of Florence E. Gilder.)

Q. Did they have any record of the insurance that was then in effect, if you recall?

A. No, they didn't have.

Q. Did you make a record, a comprehensive record, as bookkeeper, of the policies of insurance in effect?

A. Well, I had my own little schedule.

Q. What did that schedule consist of? Tell us what that schedule was.

A. Well——

Mr. Buell: Just a minute. Wouldn't the schedule itself be the best evidence?

Mr. Biggs: I am trying to find out. I am learning about this case as it goes along. I don't know what the record was, but I think the Court asked if there was an insurance record of any kind.

A. There was a ledger, my own little schedule, rather, so I could prorate my expenses for the month.

Q. Was there in existence, at the time you went to work for Grange Oil, or at any time from January 1, 1946, around to January 25, 1947, the date of the fire, an office record of the complete insurance status of the company?

A. There wasn't.

Q. I mean by that a record of the policy number, the insurer, the face amount, the premium due, or anything of that kind?

A. There was not. [42]

Q. Is there now such a record in existence, to your knowledge?

A. Well, I don't know. There may be. I might

(Testimony of Florence E. Gilder.)

be able to find it, but it was not in any book or ledger; it was only on——

Q. Have you since then, at any time, even to date, maintained such a record down there?

A. No, we don't.

Q. You do not have that kind of a record?

A. No.

Q. Your responsibility in connection with insurance, you stated, was to make reports of the specific insurance and to pay the premiums as they were billed to you, is that right?

A. That is right.

Q. Do you remember the data included in these reports which counsel has referred to, and marked Pre-Trial Exhibits 18, 19 and 20, and so forth, which records I am now handing you? State whether or not you prepared those, Miss Gilder?

A. I did.

Q. From what source did you get the information that you put into those reports? That is what I am trying to find out.

A. Well, they would bring the grain and seeds in every day; they were cleaned; they would have to clean the seed and we would ship——

Q. You are speaking now more of the value of the stock?

A. That is what I was trying to get at, to figure the value of the insurance. [43]

Q. I can understand that the value of the stock would be of importance, but I do not imagine the Court is interested in that. I was speaking about

(Testimony of Florence E. Gilder.)

insurance, specific insurance reported in the last few months by those reports. A. Yes.

Q. Where did you get that information, Miss Gilder?

A. From Mr. Jones. It was understood between us that \$50,000 would cover our specific insurance.

Q. Do you recall ever having seen a specific rider or endorsement on these policies and making a record of that for the purpose of your report?

A. No, I didn't see them.

Q. Do you recall the placing of the insurance or any of the circumstances attendant upon it?

A. No, I don't.

Q. Do you recall the telephone conversation that has been testified to?

A. Well, yes, I heard several telephone conversations regarding insurance.

Q. In other words, you don't remember this particular telephone conversation? You have no independent recollection of it?

A. I can't swear that I remember this particular one, but I heard several of them.

Q. But do you recall when you learned and how you learned that the coverage was \$50,000 on this Plant No. 2? [44]

A. Well, I took care of the values in the insurance and Mr. Jones and I usually discussed things, and it was our intention to cover it for \$50,000. We understood that is the way it was covered.

(Testimony of Florence E. Gilder.)

Q. You do know that you were told and understood that the amount was \$50,000? A. Yes.

Q. And you did fill that amount in on your report, did you? A. That is right.

Q. When did you first discover that was in error?

A. I didn't discover it until after the fire and we were working on the adjustment, and Mr. Sankela was down. After it was all figured and our adjustment came to the same conclusion, he reminded me of the fact that we were not covered for \$50,000.

Q. You say that he reminded you of the fact. What did he do, if you recall? What did he tell you?

A. I don't recall—I don't know that I exactly recall the words, but that we were not fully covered up to the \$50,000, and he didn't know just exactly what his company would do. He said we might have to pay a little more premium to cover it, but he——

Q. Was that the first information you had that the amount of your specific insurance on this building was under \$50,000? A. That is right.

Q. How long had Mr. Sankela been down there making this adjustment [45] before that information was developed?

A. I think we worked all one day there.

Q. Nothing had been said about specific insurance until after the agreement was reached on the value of the inventory?

(Testimony of Florence E. Gilder.)

A. That is right.

Q. Is that correct?

A. The value of the inventory and plant, that is right.

Q. Then did you subsequently see the endorsement, after the policies had been obtained, after the adjustment and after Mr. Jones had gone down and got the policies? Do you remember then of having seen them?

A. No, because I think he took them right away. I didn't see them.

Q. You did not see them? A. No.

Q. When you paid the premiums as they were billed to you, was there any statement of the exact amount of insurance or the premiums, as these statements came to you?

A. Well, usually there was the insurance number and the amount, and the amount of premiums but not the rate or which building the insurance applied to. That was never stated on an invoice.

Q. You simply paid them the amount for which they were billed? A. That is right.

Q. And no question was ever raised by you as to the amount of the premium? [46]

A. No, because I couldn't figure the insurance. I didn't know whether they were—I didn't know whether we were paying too much or too little.

Q. But you learned for the first time from Mr. Sankela that your specific insurance was not \$50,000. Did he tell you from whom he had learned that the insurance was not for \$50,000?

(Testimony of Florence E. Gilder.)

A. No, he didn't.

Q. You didn't know about that, or what source that came from? A. No.

Mr. Biggs: I think you may cross-examine.

Cross-Examination

By Mr. Buell:

Q. You said you did not know of this error on the part of Mr. Porter in issuing that new insurance policy until after the loss?

A. That is right.

Q. Do you not recall making any notation on any schedule or any journal entry or ledger entry or any entry on this schedule you are referring to of the fact that you had \$33,000 specific insurance on Building No. 2? A. No.

Q. You did not have any records as to which insurance was on which building with each different company? A. No.

Q. Did you have that tabulated anywhere in your records? [47]

A. Just my own little schedule so I could report it to The Mill Mutuals, the value in each of these buildings.

Q. What did you have noted on the schedule as to the specific insurance on Building No. 2?

A. That was \$145,000.

Q. And the specific insurance in the Sun and the Home?

A. I figured it was \$50,000.

Q. You had \$50,000 entered in your schedule?

A. Yes; and the reason I did that was to break

(Testimony of Florence E. Gilder.)

down the expense so I could charge the correct expense each month when I had to make my financial report.

Q. That schedule, then, was just made up from what you understood the company had in the line of insurance and did not result from your making accurate entires every time a new policy or endorsement came into the office?

A. That is right. I waited for the invoice.

The Court: This being co-operative, that breakdown is apportioned among the growers, is that the idea?

A. The expense, yes, that is right. It would have to be. The grower was charged for his amount of insurance.

Q. (Mr. Buell): That was the reason you kept that schedule, so you could apportion it?

A. So we would have a breakdown on it, yes. As far as the premium itself was concerned, that was charged to my prepaid expense, in my general ledger. [48]

Q. You prepared the reports of cash values that were sent by Grange Oil Company to The Mill Mutuals? A. Yes.

Q. And submitted them to Mr. Jones for his signature?

A. For his signature, that is right.

Q. Did you keep a copy of these reports in your records? A. Yes. I have all the reports.

Q. Are those here in court?

A. I am afraid they are not. I doubt very much if Mr. Weatherford ever had them.

(Testimony of Florence E. Gilder.)

Q. Is this schedule you referred to in court?

A. No. I didn't think it was necessary because I thought it was more for my own information than anything else.

Q. Do you know what period of time was covered by the insurance policies issued by the Sun and Home companies, how long they were to run?

A. I expect a year, unless they were canceled in the meantime.

Mr. Buell: That is all.

Redirect Examination

By Mr. Biggs:

Q. As I understood your testimony, your schedules were made for keeping track of the expense, more for keeping track of the expense of the insurance than the amount of insurance, is that correct?

A. That is right. [49]

Q. That was so the expense could be apportioned among the growers?

A. That is right.

Mr. Biggs: That is all.

(Witness excused.)

Mr. Biggs: That is all the witnesses we have available, if the Court please. We had a call in to Corvallis for Mr. Porter, but he has not called back yet. It may be we will have some additional evidence that we would like to submit to your Honor, but at this time that is all the testimony.

The Court: Do you have witnesses, Mr. Buell?

Mr. Buell: Yes, we have, your Honor.

The Court: How many?

Mr. Buell: Just one.

The Court: You had better put him on.

Mr. Buell: At this time, your Honor, I would like to have marked as Exhibit No. 27 reports of actual cash values rendered by the plaintiff to the defendant for the months of January, 1947, December, 1946, February, March and April, 1947, which were received by the defendant, as indicated.

The Court: Put all of your pre-trial exhibits in.

Mr. Buell: That was not marked as a pre-trial exhibit.

At this time the defendant offers in evidence Defendant's Pre-trial Exhibits No. 17 to No. 27, inclusive, as Defendant's [50] Exhibits.

The Court: They are admitted subject to any specific objection that may be stated at any time during the trial.

DEFENDANT'S EXHIBITS:

(Defendant's Pre-Trial Exhibits were thereupon received in evidence as Trial Exhibits as follows:)

17. Resolution of Plaintiff, dated May 28, 1947, embodying agreement between Plaintiff and Defendant as to payment and acceptance of undisputed portion of the loss.

18. Report of actual cash values made by Plaintiff for the month of May, 1946.

19. First report of actual cash values made by Plaintiff for the month of June, 1946.

20. Corrected report of cash values made by Plaintiff for the month of June, 1946.

21. Report of actual cash values made by Plaintiff for the month of July, 1946.

22. Reports of cash values made by Plaintiff for the months of August, September, October and November, 1946.

23. Work Sheet of Defendant, used in computing earned premium for the policy year May 1, 1946, to May [51] 1, 1947.

24. Provisional ledger sheet of Defendant, showing posted average values for the stock in Building No. 2 for the policy year.

25. Copy of letter of Defendant to Plaintiff dated July 10, 1946.

26. Copy of letter of Defendant to Plaintiff dated November 4, 1946.

27. Reports of actual cash values rendered by Plaintiff to Defendant for December, 1946, and January, February, March and April, 1947. [52]

Defendant's testimony:

NEIL J. SANKELA

was thereupon produced as a witness on behalf of defendant and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Buell:

Q. Your name is Neil J. Sankela?

A. That is right.

Q. What relation do you have to the defendant, Michigan Millers Mutual Fire Insurance Company?

A. Well, I am employed by The Mill Mutuals

(Testimony of Neil J. Sankela.)

in Seattle, and the Michigan Millers is one of the companies that is a member of The Mill Mutuals group.

Q. How many companies are in The Mill Mutuals group? A. There are ten.

Q. The defendant is a Michigan corporation, is that right? A. That is right.

Q. What is your capacity or title?

A. Assistant Manager.

Q. Assistant Manager of the Seattle office, is that right? A. Right.

Q. How long have you been in the insurance business?

A. Well, I have been with The Mill Mutuals since 1923—twenty-five years now.

Q. What type of insurance does The Mill Mutuals handle or write? [53]

A. Well, in our Seattle office, which is known as the Pacific Department, we are known as the mill and elevator department and handle only grain storage and processing, grain processing with some seed cleaning plants.

Q. In other words, a specialized type of insurance? A. That is right.

Q. The policy which was issued to the Grange Oil Company is known by the company as a Provisional Stock Policy. Would you state what kind of a policy that is?

A. Well, we refer to it as a provisional adjustment form of policy. It is a policy that is designed by our companies, at least, principally for grain

(Testimony of Neil J. Sankela.)

dealers, and others, to protect fluctuating values of grain as it comes in the elevator, starting in the harvest season, when it might run up to high values in a month or six weeks, and this provisional adjustment form of policy was brought about, I imagine, about twenty-five years ago and is now in very wide use, particularly in the grain trade.

Q. Is it used or is a similar type of policy used also by stock companies as well as mutuals?

A. Oh, yes. They have a provisional form of policy.

Q. What was the hardship or the difficulty, rather, which the grain and seed elevator and warehouse businesses were encountering which brought forth the development of this provisional type policy?

A. Well, they were attempting to cover fluctuating values with [54] what we call specific policies or certificates, which resulted in many policies and required a daily check during the receiving season of the amount of their policies and also required a daily check during the shipping season to see whether they had adequate coverage. It required the ordering of insurance almost daily during the receiving season and almost daily cancellations during the shipping season.

Q. The rates for a provisional policy on a particular risk, such as the risk in this case, how do they compare with the rates for specific or non-provisional insurance on the same risk?

(Testimony of Neil J. Sankela.)

A. Well, in this particular case it was a combustible type of building involved here. If we had a specific policy with the same co-insurance conditions that are on the provisional, the specific insurance would be less by about 10 per cent. The rate under the specific would be cheaper than under the provisional by about 10 per cent.

Q. How is the difference in the rate compensated, under the provisional type policy?

A. Well, under the provisional type policy, the amount of insurance fluctuates with the values, depending on the values reported. In other words, if reports of values are made accurately, the insurance follows those fluctuations, up or down as the case may be, so that they are never underinsured or never overinsured, if those values are reported accurately.

Q. On the first page of the policy which has been introduced by [55] the plaintiff, and which was issued by the defendant, it refers to a provisional amount or a provisional premium. Would you briefly tell the Court what that provisional amount or provisional premium is?

A. Of course, in the provisional policy we never know until the end of the year what the actual insurance liability is, or when the policy is issued, for that matter. In order that a premium might be collected, we have just taken 25 per cent of the limit mentioned in the policy and based the provisional premium on that 25 per cent of the limit. That is just to collect the premium at the time

(Testimony of Neil J. Sankela.)

of the issuance of the policy to comply with the state law.

Q. In Paragraph 3 of the standard stock form policy, which was issued to the plaintiff, the insured is required to make certain reports to the company. Would you tell the Court what the company does with the reports when they are received?

A. As reports or declarations of value come in each month, they are immediately given to the book-keeping department where the values are posted on what we call the provisional ledger. We have a general ledger sheet for each policy and if there is more than one location, if there is more than one location involved in the policy we have a provisional ledger sheet for each location.

Q. That would be, for each separate risk?

A. That is right.

Q. Listed under the schedules of the policy?

A. That is right, because they probably have different rates, and then the premium on each location is figured individually, and these values are entered on these provisional ledger sheets.

Q. Those values as reported are the values for each of the weeks of the month for which the report is made? A. That is right.

Q. Does your bookkeeping department keep any record or post the amount of specific insurance as such reported by the various insured?

A. No.

Q. Into any ledger or other account?

A. No, we have no record of that except unless we place the specific insurance ourselves and have

(Testimony of Neil J. Sankela.)

an authentic record of it. Where the insured has placed it himself, we have no other record than is disclosed on these declarations of value reported each month.

Q. Does the company do anything with regard to the amount reported in every case, other than to deduct it from the average value that you have just testified about?

A. That is all we do with it.

Q. Would you tell the Court whether or not reports of insurance values go through any underwriting departments?

A. Yes, they are referred to the underwriters' department for if the insurance has a reported value in excess of the limit— That quite frequently occurs, and they will have to immediately [57] get in touch with the policyholder as to whether he wants his limit increased; in other words, ask for instructions.

Q. If it appeared from the report that the insured was carrying more specific insurance than his actual values, would that fact come to the attention of the underwriting department?

A. Yes, it might, but not just for one month. We might not call the underwriting department's attention to it, but if it went on for several months, they might say, "See here, this insured has specific insurance. He really does not need to report the policy because he has reported no values under it, as far as provisional insurance is concerned."

Q. In a case such as that, if the non-provisional

(Testimony of Neil J. Sankela.)

insurance exceeds the amount of the values of the stock, is there a premium earned for that month under the provisional policy?

A. Absolutely none.

Q. Yet, under those conditions, although no premium was earned, if a loss occurred and the report had been accurate, would the company be liable under the provisional policy?

A. If a fire occurred after that report, or the month in which the report was made, and the report was in our files, although we had not earned a premium on the previous month, due to the fact that the specific insurance exceeded the insured value, if the values had increased in the interim during the current month in which the fire occurred and the values had exceeded the specific insurance, the amount of cost would be covered under the provisional [58] adjustment policy. That is an administrative feature with this policy.

Q. Are the reports of cash values rendered by the insured under this type of policy similar to—not similar but comparable to applications for new insurance or specific insurance?

A. Well, we almost regard them as a monthly order for insurance. In fact, sometimes they will include a location on this monthly report which is not covered under the policy. Then that requires us to get in touch with the insured as to what his desire is in connection with the newly reported location.

(Testimony of Neil J. Sankela.)

Q. Could you tell the Court approximately the premium volume of The Mutual Mills in the State of Oregon?

A. Oh, I don't know exactly. I would guess it is \$140,000 or \$150,000 annually.

Q. How many representatives do The Mutual Mills have in Oregon? A. They have one.

Q. His name is Mr. Hefler?

A. That is right.

Q. Is Mr. Hefler a salaried employee?

A. He is a salaried employee.

Q. What are his duties?

A. His duties are to make surveys for physical hazards and make re-inspections to discover fire hazards, and he does negotiate some insurance, but I would say 90 per cent of his time is involved in making inspections and surveys. [59]

Q. Determining the risks?

A. That is right, physical characteristics and so on.

Q. Does your company employ any auditors to inspect the books and records of accounts of your various insured clients?

A. No; only sometimes we might make a special case, in the case of a fire loss, where we would want an audit; that is the only time.

Q. Aside from any question of a fire loss, in the computing of the premium earned under the provisional policy, does The Mill Mutuals ever audit the books of the insured under the various policies? A. No, sir.

(Testimony of Neil J. Sankela.)

Q. Do they ever require the insured under these various policies to produce any specific insurance policies carried, produce them for examinations?

A. I don't recall that we ever actually have. We usually depend on the report.

Q. Mr. Sankela, it was brought out during the plaintiff's case that you had assisted in adjusting this loss. Would you tell the Court when you first learned of the actual amount of specific insurance carried in the Sun and Home Insurance Companies on this Building No. 2?

A. This loss occurred January 9th, and I believe I was in Monroe, on about January 10th, and when I arrived there I met Mr. W. J. Moe, fire insurance adjuster for the Fire Companies Adjustment [60] Bureau, as it is called or was called at that time, and he represented the Home and Sun policies.

I think I casually remarked to him that, according to the reports in our files, there was \$50,000 specific insurance involved in this fire, and he said, "No, I believe you are wrong. There is only \$33,000 odd," and then in Mr. Jones' office I believe he gave me the details of the two policies he represented, and I said, "I am just wondering if there is another policy somewhere," and he said, "I doubt it. I have wired all the insurance offices."

Q. Had you known of or ever received any information or knowledge prior to that time as to the actual amount of the specific insurance?

A. No. In fact, when I left Seattle to come

(Testimony of Neil J. Sankela.)

down I figured their loss was the amount that they had on hand less \$50,000.

Q. In Paragraph 6 of this policy, the standard provisional stock form, including the various endorsements of the policy, there is a reference made to "percentage of insurance under this policy," and in this particular case that percentage of insurance is referred to as 100 per cent.

Would you tell the Court as to what instances that percentage would be specified any less than 100 percent?

A. If the risk is larger than one company can carry, it may be spread out among two or more. If three companies, for instance, carried that risk, that 100 per cent would be changed to 33 $\frac{1}{3}$. It means it is the per cent of the liability under that form of [61] insurance. Sometimes there may be fifteen companies on a risk, providing the necessary amount of coverage, and each takes its own specific percentage.

Q. Upon what basis was the premium which was charged the plaintiff when this policy was canceled in May, 1947, calculated?

A. Well, it was calculated — based on their reports at the unburned location, following the reported values up until the time of the cancellation. The amount of loss paid was figured at the rates applicable for the unexpired portion or the period of time set under the policy, which is in accordance with the policy form.

Q. Did the company charge any premium for

(Testimony of Neil J. Sankela.)

the specific insurance which was reported by the plaintiff? A. No.

Q. Has the company ever allowed an adjustment of any loss under the provisional policy, such as the one issued to the plaintiff—allowed the insured to correct the report, the previously filed report, after the loss has occurred?

A. Never to my knowledge.

Q. Have there been instances in which the insured have tried to have such loss reported?

A. Yes, had one just less than a year ago.

Q. I show you a document marked Plaintiff's Exhibit No. 16, introduced by the plaintiff, and will ask you to examine the figures on that instrument. Are you familiar with those figures? [62]

A. Yes, sir.

Q. What do they represent?

A. This represents a computation of the insurance supplied under a provisional policy as of January 9, 1947, the date of the fire, and apportionment of the loss among the various policies involved.

Q. Was that prepared by yourself?

A. Yes, sir.

Q. Was that forwarded to the plaintiff?

A. It was.

Q. Was it sent to the plaintiff accompanied by another document?

A. Yes, it accompanied a proof of loss.

Q. In making that computation of the amount of insurance in effect, were you guided by Para-

(Testimony of Neil J. Sankela.)

graph 5 of the standard provisional stock form?

A. Yes, I followed the steps as provided in Paragraph 5 of that form.

Q. Section 5-A, which refers to the value of the stock in Building No. 2, January 9, 1947, is that in dispute?

Mr. Biggs: That is right.

Mr. Buell: The sum of \$33,333, specified in Section 5-B was the actual amount of insurance in the Sun and Home companies.

Mr. Biggs: That is correct.

Mr. Buell: Q. Would you explain to the Court how you calculated—or, first of all, would you tell the Court what Section [63] 5-C has reference to?

A. The whole paragraph provides the steps to be taken, if the insurance under this provisional policy is to be determined at any one time. Of course, most of the times when you determine the amount of insurance, it is at the time of a loss. You find out how much insurance there is and what form, because it fluctuates throughout its lifetime. Under Paragraph 5-C we refer to it as a penalty and honesty clause.

Mr. Biggs: I think, strictly speaking, that is not competent, as it calls for the opinion of the witness. However, if it is of any help to the Court, we do not care. We want to get at what the facts are.

Mr. Buell: Q. Go ahead and state how you calculate that?

A. That clause provides in case the full value required by the policy was not reported, it provides

(Testimony of Neil J. Sankela.)

for a penalty, provides for the deduction of the amount unreported from the value of the stock on hand at the time of the fire and under Section 5-C that was done, under which the liability assumed by the provisional policy was the amount of the value reported and the specific insurance deducted; the amount of specific reported was deducted, so the provisional policy in this case took on a liability of \$103,593.49, that being the actual average value reported for November, \$153,593.49 less the \$50,000 covering non-provisional insurance reported, making \$103,593.49. After the fire, we actually discovered that there was only \$33,333 of specific [64] insurance actually in force. There was an understating of values by \$16,667, and, in accordance with Paragraph 5-C, that amount was deducted to arrive at the insurance under the provisional policy.

Q. What amount of insurance did this formula which you used show to be in effect at the time of the loss?

A. It showed the insurance under the provisional policy, January 9, 1947, to be \$71,410.31.

Q. Could that figure as to the amount of insurance in effect have been arrived at in any other manner?

A. Oh, we could just have taken their word for it and deducted \$50,000 of non-provisional insurance and had the same result. It still showed \$71,410.31 insurance under the provisional reported as of January 9, 1947.

(Testimony of Neil J. Sankela.)

Q. That would be under Section 5-B?

A. That is right.

Q. When this policy was canceled out, at the end of the policy year, how was the earned premium calculated?

A. Well, it was based on the reports of values, as previously stated, on the unburned location on the last settlement date to—from the last settlement date to the date of cancellation, and on the burned location on the amount that was paid on the claim from the date of the fire to the end of the policy year.

Q. Handing you Defendant's Exhibit No. 23, I will ask you if you can identify it? [65]

A. This is a work sheet as prepared by our bookkeeper in connection with computing the earned premium on the policy in question.

Q. That was computed in the regular course of your business? A. That is right.

Q. Referring to the first column on the left side of the page marked "Location," what is listed under that column?

A. Well, the first one is the elevator and feed mill No. 1, at Monroe, Oregon, and elevator and feed mill at Varions, Oregon; then Monroe, Oregon, warehouse and seed cleaning plant No. 2.

Q. Those are different risks insured under this policy?

A. Yes. There are two more, the flax warehouse at Monroe and hay and straw storage at Varions.

Q. There appears to be a break in the time breakdown, for instance, from May 1, 1946, to

(Testimony of Neil J. Sankela.)

August 19, 1946, and there appears to be another schedule for the period of time from August 19, 1946, to May 1, 1947. Can you state the reason for that difference of breakdown there?

A. Well, Location No. 2, as far as this policy was concerned, was eliminated. Excuse me. Location No. 2, the breakdown from 8/19/46 to January 9, 1947—As of August 19, 1947, the form of the policy was changed as to coverage, making it specific instead of blanket.

Q. In other words, prior to August 19th, the policy did not attempt to set out the different buildings in which insurable goods were stored?

A. That is right.

Q. The second column marked "Total," what do the figures in there represent?

A. Pertaining to Plant No. 2—

Q. Just in general, what do they represent? What are they predicated upon?

A. They represent the total values as disclosed by the reports in that particular period.

Q. These reports of value that have been introduced in evidence in this case?

A. That is right.

Q. The next column marked "Weeks"—

A. That shows the number of weeks that the amount of insurance was in force at a certain date.

Q. And then the fourth column, "Average"?

A. That is the average of values in force for the period in question, the average liability that was assumed by the provisional policy.

(Testimony of Neil J. Sankela.)

Q. And the fifth column, "Rate"?

A. That is the rate that applied to the particular location.

Q. The column marked "AP," what does that stand for?

A. That is the premium which would have been earned on \$1,000 if the average amount of insurance had been in force for twelve months.

Q. And the column marked "EP"? [67]

A. That is the actual earned premium for that portion of the year whenever the insurance was in force. For instance, on this plant at Monroe, that insurance was in force for 20 weeks, so that figure under "EP" is the premium earned for that period.

Q. That would be 20/52nds of the annual premium indicated in the next to the last column, 20/52nds?

A. That is right.

Q. Does this exhibit, No. 23, accurately report the premium earned under this policy for the year May 1, 1946, to May 1, 1947?

A. I believe it does.

Q. The average values posted to the provisional ledger sheets for each of the risks involved and covered under this policy were posted on the basis of the information as to non-provisional insurance reported to your company by the plaintiff, is that right?

A. That is right.

Mr. Buell: No further questions.

(Testimony of Neil J. Sankela.)

Cross Examination

By Mr. Biggs:

Q. As I understand it, the whole purpose of a policy of this kind is to protect the insured over and above the actual insurance he already has? That is the general purpose of it?

A. It is to cover fluctuating values; that was the primary purpose of the policy.

Q. Specific policies were too rigid in their limitation and it was thought it would be cheaper for them to carry partial protection [68] with specific insurance and then carry non-provisional insurance that would take care of fluctuating values?

A. Some people might think that way, but we replace specific insurance with provisional policies.

Q. Completely? A. In most cases, yes.

Q. You spoke of this as being a provisional standard form of insurance. What is standard about it? Do you know of any state that adopted this form? Are there any other companies in the United States writing this kind of insurance, using expressly this form?

A. No; this form is peculiar to our company. I don't know why that word "standard" is in there.

Q. I have not found a policy that has got the same wording. You don't know why that "standard" is in there, what that "standard" means?

A. I don't know why it is in there.

Q. In your breakdown and in your method of computing, in accordance with the formula you

(Testimony of Neil J. Sankela.)

read the word "value" to include not only stock values but the amount of specific insurance, did you not?

A. That is taken into consideration, yes.

Q. Actually, that is how you have considered the word "values" in that form, as including both stock values as well as reported specific insurance?

A. Yes, and in determining the amount of liability assumed by the provisional carrier.

Q. This policy actually contains a specific definition of the word "values," does it not?

A. I believe it does.

Q. To mean only the value of stock without any reference to the amount of non-provisional insurance?

A. It has a definition of "value" in order to determine how goods are to be shipped, how they are to be valued—

Q. Actually, your policy says the word "value" wherever used shall be used to mean the value of the stock, does it not?

I call your attention to Paragraph 4 of the endorsement, (4a) — you have the endorsement there, do you?

A. I have one in my pocket, a printed form, a blank form.

Q. Use that, please, if it is the same as the one you have got in the policy.

A. I believe it is.

Q. Yes. The word "value" as used in the form, under Section 4, (4a), (4b) and (4c)—and then

(Testimony of Neil J. Sankela.)

it specifies it to mean such and such, does it not?

A. Right.

Q. Being the value of the stock with reference to the amount of insurance, isn't that correct?

A. That is what it says.

Q. So, in the formula you used in arriving at the non-provisional [70] insurance in effect, and the formula that the plaintiff contends for, the whole difference is that you read the formula to mean the value of reported stock and the amount of reported non-provisional insurance, isn't that right?

A. Well—

Q. If you read these two factors together?

A. The net liability assumed by the provisional carrier on the form was based—

Q. I was speaking of the formula that was employed in accordance with the provisions of the policy. When you computed the final premium due on this policy, you knew perfectly well what the facts were, didn't you?

A. By the end of May when that policy was canceled, the earned premium was figured for the purpose of cancellation. I think we had all agreed as to the amount which the policy was liable for.

Q. I am sorry. My question is: You computed the premium on this policy at the end of the policy year, which was in May; without reference to cancellation, you computed it?

A. Yes.

Q. You computed the premium that would have been due, even if you had not canceled it, at the end of May?

(Testimony of Neil J. Sankela.)

A. That is right, based on the reports.

Q. In May, you knew precisely all of the facts about the amount of specific insurance, all the facts about inventory and everything else, did you not?

A. Well, yes, because we discovered the actual amount of specific insurance in January.

Q. That is what I mean.

A. Yes, that is true.

Q. In dealing with grain processors—I suppose you have other co-operatives besides this particular co-operative? A. Yes.

Q. You are dealing with farmers who are primarily agriculturists rather than insurance experts and businessmen?

A. We do not deal direct with the farmers. We deal with the managers.

Q. In the very nature of the business and the type of risk you undertake, and the type of people you are dealing with, lots of errors must occur in reporting both the value and specific insurance?

A. There are some that do occur, true.

Q. Perfectly honest errors? A. Yes.

Q. Isn't it the policy of the company, by holding up liability for premiums—holding liability for premiums open until the end of the year, to give everyone a chance to clear up errors that might be compensated?

A. No. When it comes to the computing of the premium at the end of the year, those declarations of value are from their own files, their whole story, in computing premiums. [72]

(Testimony of Neil J. Sankela.)

Q. Suppose an honest error were made by reporting values as \$100,000 for a month when actually there were only \$80,000 on hand; suppose they did not have a chance to count accurately every bit of seed, with the result that they reported \$100,000 and, when the fire occurred the next month, the inventory showed only \$80,000. You would be paid off on \$80,000, wouldn't you, if the value remained the same at the time of the fire?

A. Yes.

Q. You mean you would still keep the premium for \$100,000 on the basis of the report that they had made?

A. Yes, unless they filed a corrected report.

Q. So, in many instances, assuming that honest errors are made, it operates to the advantage of the company, and you would simply keep it; whenever an error of that kind would occur, it would operate to the advantage of the company, wouldn't it?

A. Well, unless it is called to our attention, we would not know anything about it.

Q. In computing premiums or going over your books, aren't there any instances where you require an audit or receive audits from your assured at the end of the year, so that a completely accurate basis can be had for determining premiums?

A. If you mean by an audit, to go back and check over twelve months' reports to find out if they report 100 per cent, no, we do not make any audit of that kind.

(Testimony of Neil J. Sankela.)

Q. You do not make any audits of that kind?

A. No.

Q. Are there any underwriters' services that furnish information respecting the amount of over-insurance which an assured has? Isn't there such information available?

A. Not to my knowledge.

Q. You do not report to any central agency, other than your own company?

A. That is right.

Q. You don't do that?

A. Just within our own group. We do not report to anybody else.

Q. Just within your own general company?

A. That is right.

Q. Suppose in this case that the November report was the last report you received—

A. The last report on file prior to the fire.

Q. Supposing that immediately after reporting to you \$50,000 insurance that they actually had in November, that in December, for some reasons known to themselves—sufficient reasons, we will assume—they dropped their insurance to \$33,000, their specific insurance to \$33,000; then the fire occurred in January, before a report was due to you on that change in insurance; the fire occurred before the report came to you of the actual amount of specific insurance—you would not contend then that you were not liable for the additional hazard that you had assumed when the specific insurance had been decreased? [74]

(Testimony of Neil J. Sankela.)

A. I think under the conditions which you stated, if they had complied with the value report clause that the provisional policy would have taken care of that difference.

Q. So, the situation is exactly the same here, except the fact that they did not have \$50,000; mistakenly, they assumed they had more insurance than they did have. Would that put you in any different situation than you are put in in this case? It could have been done without error at all, the same situation—

A. That is one of the advantages, one of the things provided under the provisional form, in that it provides automatic coverage on increased values between reporting dates.

Q. And if a loss occurs between reporting dates, even though there has been a change in the insurance, I am speaking about, you would still go ahead and assume the additional liability?

A. Subject to the other conditions of the policy, of course, subject to the value reporting clause, and subject to the limit and so forth.

Q. Yes. I mean within the limits of \$145,000, you would have accepted in that case an increased premium to cover that additional hazard?

A. Well, the policy would, by its terms, assume any liability between reporting dates.

Q. Could you tell us how much premium is involved here, what the premium would have been if they had reported only \$33,000 [75] specific insurance instead of \$50,000, or would that require a little computation?

(Testimony of Neil J. Sankela.)

A. I have not computed that. I haven't any idea, but it would probably be—\$16,672 would be the difference, so the rate to apply to that—

Q. Could you give us any idea what the amount is?

A. The rate I think was at that time \$1.91—The annual rate would be \$233, roughly. That would be the annual rate. Breaking that down into months, it would be one-twelfth of that.

Q. So the amount of the premium is not very much, is it? A. Apparently not.

Q. The amount of the premium that would be involved here? A. No.

Q. You have never and your company has never submitted to the Grange Oil a statement of the amount of that premium?

A. That would have been earned?

Q. Yes. A. No, I don't believe they have.

Q. Just what is the purpose, if you can enlighten us, of deferring computation of the premium to the end of the year, rather than to make it on a monthly basis?

A. Well, it has just been the policy of our group of companies to make it on an annual basis. I think some companies did render earned premium statements monthly, on a monthly basis, but we never have. [76]

Q. You never have? A. No.

Q. You defer it until, as you say, all the information is available—solely on the basis of reports rendered. You don't do that until the end of the year? A. That is right.

(Testimony of Neil J. Sankela.)

Q. By "contributing insurance" is meant insurance from all companies on the risk, is that correct?

A. They contribute to the payment of the loss, yes.

Q. I am not sure that I understand it correctly—correct me if I am wrong. You said provisional insurance is about 10 per cent higher than non-provisional or specific insurance rates would be on the same risk, with similar policy conditions?

A. Just applying to our own group.

Q. Yes.

A. That does not apply to other companies.

Mr. Biggs: I think that is all, your Honor.

Redirect Examination

By Mr. Buell:

Q. Mr. Sankela, did you state that this provisional insurance policy is to cover changes, fluctuating changes in value between reporting dates?

A. If a man reports, say, \$50,000 for the month of November and then a fire occurs, say, on the 15th of December, and he has \$75,000 of value, he is covered for \$75,000, provided he has [77] complied with the other conditions of the policy.

Q. This case here then is not one where a change occurred between reporting dates?

A. Not as to the provisional insurance or non-provisional insurance. It was the same in November as it was on January 9th. There has been no change.

Mr. Buell: No further questions.

(Witness excused.)

Mr. Biggs: I neglected to state, your Honor, that it is stipulated in the pre-trial order that the amount of attorney's fees may be determined by the Court, with or without expert testimony. Shall we leave it that way? Mr. Weatherford is here, if he wants to produce testimony.

The Court: Just as you wish.

Plaintiff's Testimony as to Attorney's Fees

MARK V. WEATHERFORD

was thereupon produced as a witness on behalf of Plaintiff and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Biggs:

Q. Will you state your full name, please.

A. Mark V. Watherford.

Q. Where do you reside, Mr. Weatherford?

A. Albany, Oregon. [78]

Q. What is your occupation?

A. Attorney.

Q. How long have you been admitted to the Bar? A. Since 1910.

Q. That is the Bar of this Court and the Supreme Court of Oregon? A. Yes.

Q. During that time have you been continuously engaged in the practice of the law?

A. Yes, except for about six or seven years during the First World War and following.

Q. What is the general character and nature of your practice? A. General practice.

(Testimony of Mark V. Weatherford.)

Q. Are you associated with any others in the practice of law? A. Yes.

Q. With whom?

A. The law firm of Weatherford & Thompson.

Q. You are the attorney of record in the action brought by the plaintiff here for the plaintiff, the Grange Oil Company of Linn and Benton Counties? A. Yes.

Q. When were you retained?

A. It was after the fire.

Q. Will you relate to the Court briefly what your services have been and what they have consisted of in connection with counseling [79] your client in this case, preparing the case for trial, instituting the action, and the brief work and other work incident to bringing it on for trial?

A. Of course, the usual advice, in the matter; probably half a dozen meetings with all of the board of directors; probably twice that many meetings with the manager; some considerable correspondence with the insurance company and its attorneys.

Q. Is some of that correspondence in evidence here?

A. Yes. There was a monumental amount of material to be examined and legal investigation to be made. This question had not been before the courts and required an unusual amount of legal investigation, without too much results.

Then there was the preparation of the complaint and preparation for trial, pre-trial and trial.

(Testimony of Mark V. Weatherford.)

I assume that, all told, I have spent thirty days on this case to the exclusion of anything else. That is only an estimate, but I think that is pretty close. Then, I have had assistance.

Q. You associated our firm?

A. Yes, and I have had probably four conferences with you, one in Albany, I think two or three in your office, and a number of trips to Portland from Albany.

Q. Had you ever had before any experience with insurance companies, either in maintaining actions against them or defending actions for them?

A. Yes. I can recall one or two cases, one at least, that went to the Supreme Court. I can recall other cases that were filed and settled, but not a great deal of insurance alone.

Q. Mr. Weatherford, considering the amount of work that you have done and that others have done at your request and with your assistance and under your counsel in this case, the amount involved, and the difficulties and complexities of this case, do you have an opinion as to what reasonable attorney's fees should be allowed the plaintiff in this case, if it prevails?

A. Yes, I do have.

Q. Will you state to the Court what that is.

A. For preparation and trial of the case, I would say \$1500.

Q. Did you have some other amount in mind for other services rendered?

A. I don't think that would be enough, to include office work that we did in the settlement

(Testimony of Mark V. Weatherford.)

and so on, but it is my understanding that is not included in the attorney's fees, that other work involved in the settlement.

Mr. Biggs: You may cross-examine.

Mr. Buell: We have no examination, your Honor.

(Witness excused.)

The Court: Any rebuttal?

Mr. Buell: The defendant rests.

Mr. Biggs: We rest, your Honor. [81]

The Court: Do you want to argue the case later, or do you want to do it now?

Mr. Biggs: My suggestion would be, if it is agreeable with you, to continue the argument until after we have filed our briefs. We have got a lot of legal memoranda which is not in proper shape at present, which we wish to present to your Honor. I think in a short time we could get it into a form that would be helpful.

Mr. Buell: I think that would be the advisable procedure, your Honor.

The Court: How much time do you want, keeping in mind that July 4th is going to be here soon.

Mr. Biggs: We understand you want to get this disposed of before the Fourth?

The Court: If possible.

* * * *

Defendant's Objections to Plaintiff's Exhibits

Mr. Buell: The defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 14 for the reason that it refers to the terms of the agree-

ment between the plaintiff and defendant for the payment of the undisputed portion of the loss, and the best evidence of which is the resolution itself.

Defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 13 for the reason that it only serves to indicate the willingness of the plaintiff to exchange the nominal [82] sum of \$300 for \$16,000.

Defendant objects to the introduction in evidence of Plaintiff's Pre-trial Exhibit No. 11 on the ground that it refers to the basis for the payment of the undisputed portion of the loss, the best evidence of which is the resolution.

Defendant objects to the introduction of Plaintiff's Pre-trial Exhibit No. 7 on the ground that it is irrelevant.

Defendant objects to Plaintiff's Pre-trial Exhibit No. 5 on the ground that it is irrelevant.

Defendant objects to the introduction in evidence of Plaintiff's Pre-trial Exhibit No. 2 on the ground that it is irrelevant, and on the further ground that it refers to the terms and coverage under the policy, the best evidence of which is the policy itself. [83]

REPORTER'S CERTIFICATE

I, Ira G. Holcomb, a Court Reporter of the above-entitled Court, duly appointed and qualified, do hereby certify that on the 25th day of May, A. D. 1948, I reported in shorthand certain proceedings occurring on the trial of the above-entitled matter, that I subsequently caused my said shorthand notes to be reduced to typewriting, and that

the foregoing transcript, pages numbered 1 to 83, both inclusive, constitutes a full, true and accurate transcript of said proceedings, so taken by me in shorthand on said date as aforesaid, and of the whole thereof.

Dated this 21st day of October, A. D. 1948.

/s/ IRA G. HOLCOMB,
Court Reporter.

[Endorsed]: Filed Oct. 23, 1948.

[Endorsed]: No. 12114. United States Court of Appeals for the Ninth Circuit. Michigan Millers Mutual Fire Insurance Company, a corporation, Appellant, vs. Grange Oil Company of Linn and Benton Counties, a cooperative corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed December 4, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit.

No. 12114

GRANGE OIL COMPANY OF LINN & BEN-
TON COUNTIES, a co-operative corporation,
Appellee,

vs.

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a Michigan corpora-
tion,
Appellant.

STATEMENT OF POINTS UPON WHICH
APPELLANT WILL RELY ON APPEAL

To the Clerk of the above entitled Court:

The appellant for its statement of points upon
which it will rely on appeal hereby adopts the
statement of points appearing in the certified tran-
script of record herein.

GRIFFITH, PECK,
PHILLIPS & NELSON,
/s/ JAMES K. BUELL,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 6, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeal and Cause.]

MOTION

Comes now appellant and moves the Court for an order dispensing with the necessity for reproducing in the printed record on appeal herein Plaintiff's Exhibit 1 and defendant's Exhibits 19, 20 and 22, and providing that such Exhibits will be considered in their original form without reproduction. This motion is based upon the affidavit of James K. Buell and the stipulation of appellant and appellee hereto attached.

Dated at Portland, Oregon, this 4th day of December, 1948.

GRIFFITH, PECK,

PHILLIPS & NELSON,

By /s/ JAMES K. BUELL,

Attorneys for Appellant.

(Acknowledgment of Service.)

AFFIDAVIT

I, James K. Buell, being first duly sworn, depose and say that I am one of attorneys for appellant in the above entitled cause; that plaintiff's Exhibit 1 is the policy of insurance which is the subject of the above cause and is material to this case; that said policy of insurance contains numerous riders and endorsements and assignments which are immaterial to the determination of this cause; that it is a provisional reporting type policy on a Standard Fire Insurance Policy Form to which has been attached a Standard Provisional Stock Form

endorsement for supplemental contract; that said Standard Provisional Stock Form endorsement has been designated and will appear in the printed record herein; and the policy is not in its entirety susceptible of reproduction in the printed record on appeal.

That defendant's Exhibits 19, 20 and 22 are reports of values made by appellee to appellant and are material to the cause; that the data contained in said reports has been tabulated and will appear in the printed record on appeal; and, that the reports in themselves on and in the form rendered are illustrative and are not susceptible to reproduction in the printed record on appeal herein.

/s/ JAMES K. BUELL.

Subscribed and sworn to before me this 4th day of December, 1948.

(Seal) /s/ RUTH H. OLSON,
Notary Public for Oregon.

My commission expires December 25, 1950.

STIPULATION

It is hereby stipulated by and between appellant and appellee through their respective attorneys of record that plaintiff's Exhibit 1, which is a policy of insurance and which is the subject of the above case, cannot be practicably reproduced in its entirety in the printed record on appeal, and that the Standard Provisional Stock Form endorsement of said policy can and will be reproduced in the

printed record, and that defendant's Exhibits 19, 20 and 22 are reports of values, the data of which can and will be incorporated in the printed record but which cannot be practicably reproduced in the printed record on appeal in its entirety. Application is, therefore, made for an order dispensing with the necessity of printing such Exhibits and providing that they may be considered in their original form without reproduction of them in their entirety in the printed record on appeal.

Dated at Portland, Oregon, this 4th day of December, 1948.

 GRIFFITH, PECK,
 PHILLIPS & NELSON,
By /s/ JAMES K. BUELL,
 Attorneys for Appellant.

 /s/ HUGH L. BIGGS,
Of Hart, Spencer, McCulloch & Rockwood and
Weatherford & Thompson, Attorneys for
Appellee.

So Ordered:

 /s/ WILLIAM DENMAN,
Chief Judge, U. S. Court of Appeals for the Ninth
Circuit.

[Endorsed]: Filed December 7, 1948. Paul P.
O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL TO BE PRINTED

To the Clerk of the above entitled Court:

The record on appeal having been transmitted by the Clerk of the District Court to the Clerk of the United States Circuit Court of Appeals, the appellant hereby designates the following to be included in the printed transcript of record herein:

1. The entire certified transcript of record herein including reporter's transcript of testimony and original exhibits except

a. Such exhibits as the Court may order shall be considered in their original form without the necessity of reproducing in the printed record.

b. The following items pertaining to the removal of the above cause from the State Court: Circuit Court Summons, Notice of Removal, Undertaking for Removal, Petition for Removal, Affidavit of Mailing Petition, Undertaking and Notice, Order of Removal.

2. Statement of points upon which the appellant intends to rely on appeal in the Circuit Court of Appeals.

3. Designation of contents of record on appeal to be printed.

4. Order (if granted by the Court) dispensing with the necessity of printing exhibits.

GRIFFITH, PECK,
PHILLIPS & NELSON,
By /s/ JAMES K. BUELL,
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed December 6, 1948. Paul P.
O'Brien, Clerk.

In the United States
COURT OF APPEALS
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,
Appellant,
vs.

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a co-operative corporation,
Appellee.

Appeal from United States District Court for the State of Oregon.

BRIEF OF APPELLANT

GRIFFITH, PECK, PHILLIPS & COUGHLIN
Electric Building
Portland 5, Oregon

HEINEKE AND CONKLIN
135 South LaSalle Street
Chicago 3, Illinois

Of Counsel.

FILED

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PAUL F. O'BRIEN,

CLERK

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In the United States
COURT OF APPEALS
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE IN-
SURANCE COMPANY, a corporation,
Appellant,

vs.

GRANGE OIL COMPANY OF LINN AND
BENTON COUNTIES, a co-operative cor-
poration,
Appellee.

Appeal from United States District Court for the
State of Oregon.

BRIEF OF APPELLANT

JURISDICTION

This suit, brought by the appellee in the state court in Oregon by complaint filed against appellant (Tr. 2-7), was removed to the United States District Court upon petition of the appellant, defendant below, pursuant to Title 28, U.S.C.A. Sec. 41 (1b), on the ground

of diversity of citizenship. Plaintiff is a corporation organized under the laws of Oregon and defendant is a corporation organized under the laws of Michigan (Tr. 2). The amount claimed by the complaint exceeded \$3,000.00 exclusive of interest and costs (Tr. 7). The existence of such diversity and the existence of the jurisdictional amount were admitted below (Tr. 26) and no jurisdictional question is involved either under Title 28, U.S.C.A. Sec 41 (1b) which governed when the cause was removed from the state court to the United States District Court for the District of Oregon, or under Title 28, U.S. Code, Sec. 1332, (a1) in force when the judgment of the District Court was entered. Since there is no question as to the efficacy of the removal proceedings the Petition, notice, undertaking and order were not included in the printed record; they are however included in the Transcript of record from the District Court.

This appeal, under Title 28, United States Code, Judiciary and Judicial Procedure, Sec. 1291, is from a judgment against the defendant for \$16,356.20 plus interest and \$1500.00 attorneys' fees entered on September 20, 1948 (Tr. 63-64). Notice of appeal was filed on October 14, 1948 (Tr. 64-65) within the thirty day period permitted by Sec. 2107, Title 28, United States Code, Judiciary and Judicial Procedure, which became effective September 1, 1948.

STATEMENT OF CASE

The effect of the judgment in the present case is to give to the plaintiff an additional \$16,666.67 of fire insurance coverage for which the plaintiff, as insured, would not have paid a premium if the loss occasioned by a fire occurring on January 9, 1947, had not happened. This result is reached by the trial court's holding that the plaintiff was not bound by its previous erroneous reports stating under oath that the amount of "non-provisional" insurance (i. e., insurance other than defendant's provisional reporting policy described below), which is deductible in determining the amount of defendant's premium, was \$50,000. In this suit, the plaintiff was permitted to prove that the correct amount of non-provisional insurance was only \$33,333.-00, thereby increasing by \$16,666.67 the insurance under defendant's policy.

This case, therefore, involves the highly important question whether after a fire loss occurs the insured may abandon previous reports of the amount of non-provisional insurance and may show a mistake—in this case an honest one, but in the next case perhaps more doubtful—in the amount of non-provisional insurance reported, and by such showing increase the amount of insurance under the provisional reporting policy over and above the figure shown by the insured's previous sworn statements.

This result is so shocking to the conscience, so contrary to the theory of provisional reporting insurance, and so liable to future abuse in the understatement

of amounts on which premiums are computed, that this appeal is prosecuted.

The policy in suit was a provisional reporting form and the original policy, No. 133021, being plaintiff's Exhibit 1, has been transmitted by order of the District Court to this Honorable Court in lieu of setting it forth in full in the transcript of the record. The policy was originally issued to Theodore Kowalski on the 1st day of May, 1943, for a period of five years, and was assigned to the appellee in this case with the consent of the appellant.

There is no conflict in the testimony, and there is no issue of fact, as we understand it, the judgment of the trial court being held entered as a matter of law upon facts agreed to in the pre-trial order or by uncontradicted testimony.

The policy, being the standard form of fire insurance policy in use in Oregon, had attached to it the standard provisional stock form used by the appellant. The property covered by insurance was stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies not otherwise insured * * * while contained in the building or buildings as located and described in the "Schedule Endorsement" attached to the policy. The property which was destroyed by fire on January 9, 1947, was in the frame warehouse and seed cleaning plant known as Plant No. 2, and is Item 2 in the amended "Schedule Endorsement" dated August 19, 1946.

The limit of insurance subject to any one fire at Plant No. 2 was \$145,000.00, and the limit of liability under appellant's policy, subject to any one fire at this location, was also \$145,000.00, and the full limit of liability, or 100% of the limit of insurance up to \$145,000.00 afforded by the provisional policy, was assumed by the appellant.

Since this is a provisional policy, the actual amount of insurance applicable to a loss as of the date of the fire is determined by a formula contained in the provisional stock form attached to the policy, the limit of liability being important only as determining the maximum liability appellant can have by reason of a fire in Plant No. 2. As the loss did not approximate the limit of liability, the need of further considering it is eliminated.

As the pertinent provisions of the policy necessary for the decision in this case are, in our opinion, found in the standard provisional stock form (Tr. 19-24, 57-62), we will, for the convenience of the Court, set them forth here.

Paragraph 2 provides generally that any specific amount of insurance named in the policy is not only provisional, and that the amount of insurance afforded by the policy at any time "shall be determined by the procedure outlined in paragraph 5" (Tr. 58).

Paragraph 3 reads as follows:

"The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of

each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in paragraph 4) of the stock covered hereunder at each location described in the 'Schedule Endorsement', as of the close of business on each Saturday of such month; and, if the insured so elect, such amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; *and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.*" (Italics supplied.)

Paragraph 4 defines the word "Stock" as used in the form, and says:

"It is further agreed that wherever the term 'Value' is used in this form it shall apply in the manner set forth in sections (4a), (4b) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:"

There is, as we understand, no question but what the value of the stock destroyed was determined in accordance with said sections (4a), (4b) and (4c). (Tr. 58-59.)

Paragraph 5 contains the formula under which the amount of insurance applicable at the time of the loss is determined. It reads as follows:

"5. The Amount of Insurance under this form, at any time, at any location described in the 'Schedule Endorsement,' shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5 A. As of the time at which insurance in force is to be determined, ascertain the value,

as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the 'Limit of Insurance' named in the 'Schedule Endorsement,' at such location, the amount thus determined shall be the 'Amount of Insurance under this form.'

2. If the amount determined in Sections 5A, 5B and 5C is equal to or greater than the 'Limit of Insurance' named in the 'Schedule Endorsement' at such location, the amount of the 'Limit of Insurance' so named shall be the 'Amount of Insurance under this form.' "

Paragraph 7 provides that the statement under Paragraph 3, shall be used for the determination and adjustment on each anniversary date of the policy of the premium earned, as follows:

"7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy, based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but *no per-*

mium shall be charged on any values in excess of the amount named as the 'Limit of Liability Under This Policy,' nor on any value protected by non-provisional insurance against the hazards covered hereunder reported in accordance with Paragraph 3." (Italics supplied. Tr. 22.)

There is no provision in said "Standard Provisional Stock Form" for any audit by the insurer of the insured's books, records or other policies of insurance. It is admitted in the present case that the insured had not paid a premium to appellant on that \$50,000 of value represented by non-provisional or specific insurance reported by the appellee in its statement of values under Paragraph 3.

Paragraph 8 of the form reads as follows (Tr. 61):

"It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred." (Italics supplied.)

Paragraph 14 is the co-insurance clause in the policy and it reads as follows:

"Co-Insurance Clause: In consideration of the acceptance by the insured of the following Co-insurance Clause a reduction from the established premium rate of \$ — to — has been allowed on this insurance:

In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing in-

insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss."

This policy was specifically designed to protect fluctuating values of grain coming into the elevator (Tr. 124) and is particularly adaptable to the needs of an insured with varying values. For example, during November, 1946, the insured's values in Plant No. 2 reached a high of \$156,402.57 on Saturday of the first week and a low of \$150,703.62 on Saturday of the fifth week (Tr. 46). In July, 1946, when all of the locations were grouped, the value rose from \$45,000.00 on Saturday of the first week to \$244,328.29 on Saturday of the fourth week (Tr. 45).

Under the obligation imposed by paragraph 3 of the form, the appellee filed monthly reports showing the actual cash values for each Saturday of the months of August, September, October and November, 1946, and in each such monthly report listed \$50,000.00 of non-provisional insurance. These monthly reports were introduced as Defendant's Exhibit 22 (Tr. 41) and by order of Court the originals thereof were transmitted to this Court. They are summarized in the printed transcript (pp. 44-46). In each report of values and in compliance with the specific requirement of Paragraph 3 by which the appellee agreed to file a true statement in writing, including in such statement the amount of any non-provisional insurance on its stock, appellee

reported \$50,000.00 of non-provisional stock insurance on the contents of Plant No. 2 for the months of August, September, October and November, 1946. Upon receipt of each of these reports, the non-provisional insurance of \$50,000.00 reported was deducted from each Saturday value and the difference was posted upon the provisional ledger sheet of the defendant as the amount of its insurance (Deft.'s Ex. 24, Tr. 43). Defendant's computation of the premium earned is predicated upon the figures appearing on its provisional ledger sheet and for each of the weeks ending August 24, 1946, through November 30, 1946, which was the last report of values prior to the loss, the plaintiff was given credit for \$50,000.00 of non-provisional stock insurance covering on the contents of Plant No. 2, which amount was deducted from the values on hand before the basis for premium charge was reached in accordance with the terms of Paragraph 7.

It is conceded that, although the appellee attempted to obtain \$50,000.00 of non-provisional insurance, it actually, because of an unexplained mistake, obtained insurance upon this specific location in the amount, only, of \$33,333.33. (Tr. 90, 91, 98, 101, 102.) The good faith of the appellee in reporting \$50,000.00 of non-provisional insurance is not questioned, but neither is it questioned that believing that it did have \$50,000.00 of non-provisional insurance covering the contents of Plant No. 2, the appellee in all of the reports filed pursuant to Paragraph 3 of the form so reported.

The importance of the non-provisional, or specific

insurance was explained to the insured in two letters within the six month period before this loss. The report of values filed by the appellee for the month of June, 1946, reported no values on hand (Tr. 45). On the 10th day of July, 1946, the appellant wrote to the appellee and said, in part:

"It seems rather strange that a business of this size would have no values on stock unless, of course, you have some specific insurance which was mentioned in some correspondence some time ago. With the thought in mind that this provisional policy is not fully understood, we would call your attention to the fact that under the terms and requirements of that policy all values in the house must be reported to us. *Then if there is any specific insurance, it is shown out in the last column and if it exceeds the actual values then there would be no liability under our policy.*

"Therefore, on the basis of the policy coverage and the requirements, we will appreciate it if you will make up a new form for June showing the total values in the plant and the amount of specific insurance in the last column. That will enable us to make the proper entry here." (Italics supplied. Deft.'s Ex, 25, Tr. 48.)

On November 24, 1946, appellant again wrote the appellee—this time about the report of values for October (Tr. 45)—speaking of \$50,000.00 of specific insurance on Plant No. 1 as being unnecessary, and as to Plant No. 2, saying:

"On Item 2 you are still over our limit but a portion of the specific insurance could be discontinued if you want to do so." (Deft.'s Ex. 26, Tr. 49.)

On the 9th day of January, 1947, Plant No. 2 burned. It was agreed that the value of the stock destroyed was \$121,410.31, and that there was salvage of \$753.89. It was also agreed that the actual amount of specific insurance which plaintiff had in each of the months of August, September, October and November was not \$50,000.00 as had been reported, but \$33,333.33. (Admitted Fact 6 in Pre-trial Order, Tr. 28.)

The fire having occurred, and the amount of the loss having been determined, it was necessary to determine the amount of insurance afforded under the form.

While we feel that if we had been making the computation of the amount of insurance afforded the appellee by this policy we would have simply said that there was a loss agreed to of \$121,410.31 and there was non-provisional insurance of \$50,000.00, so that there was insurance afforded by appellant's policy of \$71,410.31, we know that the proper way to determine the figure was to follow the formula in the contract and not take even obvious shortcuts.

In the pre-trial order and upon the trial of the case the appellant contended, and upon this appeal contends, that the amount of insurance applicable to the loss of January 9, 1947, under the policy issued by it should be determined as follows:

Sec. 5A

Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
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Sec. 5B

Deduct amount of non-provisional or specific insurance ACTUALLY in effect.....	33,333.33
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88,076.98

Sec. 5C (1)

The actual values and amounts as determined from the records of plaintiff for the month of November, 1946, the last month for which a report of actual cash value was filed prior to loss.....

	\$153,593.49
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Less actual, specific insurance ACTUALLY in effect.....	33,333.33
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Actual value not covered by specific insurance.....	\$120,260.16
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Sec. 5C (2)

Values and amounts as determined from report of November, 1946:

Value of stock.....	\$153,593.49
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Less specific insurance reported.....	50,000.00
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Values reported not covered by specific insurance.....	\$103,593.49
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Sec. 5C (3)

Actual value not covered by specific insurance.....	\$120,260.16
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Less value reported not covered by specific insurance.....	103,593.49
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Values under-reported.....	\$16,666.67
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Sec. 5C (4)

Actual value of the stock on January 9, 1947, as determined by the records of plaintiff.....	\$121,410.31
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Deduct amount of non-provisional, or specific insurance ACTUALLY in effect on January 9, 1947.....	33,333.33
	<hr/>
	88,076.98
Less values under-reported.....	16,666.67
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Sec. 5D	
Amount of provisional insurance in force under the policy.....	\$71,410.31

Through the application of the co-insurance clause and by reason of the salvage, which, of course, was not taken into consideration in the determination of the amount of insurance afforded by appellant's policy, the amount which the appellant felt it was liable to its insured was determined to be \$70,966.89 and this amount appellant paid to the appellee promptly (Tr. 55) with the agreement that said payment was without prejudice to the rights of either the appellant or the appellee. (Tr. 27, Admitted Fact 5.)

Upon this evidence the learned trial judge filed a memorandum decision saying:

"I don't feel that a clause in an insurance contract should be given the legal effect of a warranty, unless the policy makes it plain that this was intended. It is not plain in this case. Therefore, testing the situation by the usual rule of damages, plaintiff is liable for the premium, while defendant remains liable for the insurance." (Tr. 50).

Judgment was entered against the defendant and in favor of the plaintiff in the principal sum of \$16,356.20, together with interest and \$1500.00 attorneys' fees (Tr. 63). The appellant has taken this appeal from that judgment.

SPECIFICATION OF ERRORS

The Court erred:

1. In holding in Conclusion of Law No. II that plaintiff's obligation to report the amount of specific insurance in force on the goods covered by the appellant's policy did not constitute a promissory warranty.

2. In holding in Conclusion of Law No. III that the plaintiff's error in reporting the amount of specific insurance in effect did not relieve defendant from liability to pay the full amount of the plaintiff's loss less the actual amount of specific insurance carried by the plaintiff.

3. In holding in Conclusion of Law No. IV that the amount of loss for which defendant became liable to the plaintiff was \$87,323.09, instead of \$70,966.89, and in concluding further that there was a balance due plaintiff from defendant in the amount of \$16,356.20.

4. In holding in Conclusion of Law No. V that plaintiff was entitled to a judgment against the defendant in the sum of \$16,356.20, together with interest, costs and attorneys' fees.

5. In failing to make a Conclusion of Law that the plaintiff's error in reporting to defendant the amount of specific insurance in effect reduced the amount of insurance by the amount of the error in the report.

6. In failing to make a Conclusion of Law that the defendant had by its payment to the plaintiff of

\$70,966.89 discharged its full obligation under its policy to the plaintiff.

7. In failing to conclude as a matter of law that the defendant was entitled to a judgment.

8. In entering judgment in favor of the plaintiff and against the defendant.

SUMMARY OF ARGUMENT

I

The Judgment In This Case Violates The Theory Underlying Reporting Forms of Insurance

A reporting form of policy affords to an insured with varying or fluctuating values an opportunity to order through his periodic reports of values sufficient insurance for his varying needs. It permits him, in effect, to buy monthly the insurance he needs instead of buying yearly enough to cover his peak loads and thus paying for amounts of insurance which he frequently does not need.

In the policy sued upon in this case the insured agreed to file with the insurer after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value of the stock covered at each location as of the close of business on each Saturday of the month and the amount of non-provisional or specific insurance on said stock. The result of true statements is insurance coverage, not to the value re-

ported, but insurance coverage which follows the values up and down so the insured has and pays for only the insurance protection it needs, providing only that the loss shall not exceed a "Limit of Liability" agreed to by the parties to the policy.

In the policy (Paragraph 7 of the form) it is provided that the premium shall be determined upon the average of the values filed but that no premium shall be charged on the amount of non-provisional insurance reported.

A discussion of the more important cases involving reporting forms of policy is contained in this first division of the argument.

As every effort was made to limit the quotations therefrom to an absolute minimum we will say only that we feel the *Wallace* case from this circuit (166 F. 2d 571) affirmed by this Court in a *per curiam* opinion, "on the grounds and for the reasons stated" in the opinion of the District Court (70 F. Supp. 193), is governing in this case. We believe that the insurer interpreted its policy as Judge Harrison and this Court held a reporting form of policy should be interpreted. There are two recent cases from the Tenth Circuit and one from the Court of Appeals of New York quoted from in the argument, which may not be further summarized.

II

The Judgment Below Disregards The Language of The Policy Involved Here

Under the terms of the policy sued upon the insured was obligated to file with the insured each month "a true statement in writing of the value of the stock covered hereunder * * * and the amount of any non-provisional insurance on any stock."

The insurer reported the value of its stock on hand accurately, but erroneously reported in each monthly report of values that it had \$50,000.00 of non-provisional insurance, when in fact it had only \$33,333.33. The Federal Court cases which we quote from in the first division of our argument hold that under-reporting resulted in under-insurance.

The policy provision requiring "a true statement" is a promissory warranty on the insured's part. The policy, however, does not provide for a forfeiture and none was claimed when the mistake was discovered after the fire. Instead, the appellant took the position that the reports required by the policy were in fact orders for insurance. If the values were accurately reported the assured had coverage under appellant's policy on the day of the loss up to \$145,000.00 of loss over and above the \$50,000.00 of specific insurance reported.

The policy of insurance also provided that the insurer could not charge a premium for any value covered by non-provisional insurance.

The insured was given the right under the policy to change its reports of value at any time prior to a loss.

It is urged that having made a contract fair and unambiguous, having eliminated the harsh consequences attendant upon a breach of warranty, the contract as made should be enforced. By over-reporting its non-provisional insurance the appellee under-reported its values. Thereby it failed to order enough insurance for its needs and it may not be permitted, after the fire, to increase the amount of insurance coverage under appellant's policy by saying, "We made a mistake and had \$16,666.67 more value than we reported to you because we actually had only \$33,333.33 of non-provisional insurance although we have consistently reported to you that we had \$50,000.00. Now after the fire we wish to change our reports." This cannot be done under the contract.

III

The Consequence of The Untrue Statement of The Amount of Non-Provisional Insurance Is To Reduce The Amount of Insurance Available To The Insured

Upon the happening of the loss on January 9, 1947, the loss was determined to be \$121,410.31. Appellant's policy being for a provisional amount, it became necessary to determine the amount of insurance coverage afforded by its policy upon that day.

The simple way to do it would be to subtract \$50,000.00, the amount of non-provisional or specific insurance reported, from \$121,410.31, which would give \$71,410.31, but the policy had to have a formula to fit all circumstances, and under the formula in the policy the amount of insurance available under appellant's policy is determined thus:

Actual value of stock on hand January 9, 1947.....		\$121,410.31
Actual non-provisional insurance.....		33,333.33
		<hr/>
		88,076.98
Average values on hand in November.....	\$153,593.49	
Non - provisional insurance in force.....	33,333.33	
	<hr/>	
Actual values not covered by non-provisional insurance.....	\$120,260.16	
Average values on hand in November.....	\$153,593.49	
Non - provisional insurance reported.....	50,000.00	
	<hr/>	
Values reported for insurance and premium purposes.....	103,593.49	
	<hr/>	
Values under-reported.....		16,666.67
Amount of insurance under appellant's policy.....		<hr/>
		\$71,410.31

And this amount (subject to immaterial and admitted adjustments, chiefly because of salvage, which reduced it to \$70,966.89) appellant paid. Having discharged in full its obligation under its policy by paying the entire amount of insurance, there should have been a judgment in its favor.

I

The Judgment In This Case Violates The Theory Underlying Reporting Forms of Insurance Such As The Provisional Stock Form Involved Here

The appellant cannot enter upon the argument of the law applicable to the facts in this case without first commenting upon the particular form of policy involved.

A provisional or reporting form of policy has with great care been developed by the insurance companies and tailored to the needs of many businesses which from their very nature have varying or fluctuating values of stock on hand. Particularly is the policy adapted to businesses with seasonal increases or decreases. As Mr. Sankela said in his testimony:

“It is a policy that is designed by our companies * * * to protect fluctuating values of grain as it comes into the elevator, starting in the harvest season, when it might run up to high values in a month or six weeks” (Tr. 123).

In our statement of the case we called attention to the fact that plaintiff's values in July, 1946, increased from \$45,000.00 on the first Saturday to about \$244,-

000.00 on the fourth Saturday (Tr. 45) and that there was a spread of almost \$6,000.00 of value on the contents of Plant No. 2 between the first Saturday of November and the fifth Saturday of November (Tr. 46). In August, in this same Plant No. 2 there was a variation between the first and fourth Saturdays of approximately \$32,000.00 in value (Tr. 45).

Without the reporting form of policy, an insured would necessarily have to have insurance to protect his peak values, with the result that he would be paying for insurance much of the time when the goods at risk were worth substantially less than they were at peak times or he would have to be amending his specific policy constantly. This form permits him in practice to order insurance each month. Under the terms and provisions of the policy he reports his values as of the close of business on each Saturday and he reports the amount of his non-provisional insurance. Paragraph 7 provides that the premium shall be determined from the average of values thus reported, but no premium shall be charged on the amount of non-provisional insurance reported. Hence, the basis of the premium charged and the amount of coverage are determined from the report made under paragraph 3. If properly and honestly reported under this form, the insured's protection follows his values up or down during the period between the receipt of the reports of value and the fire. The reports of value furnish the sole basis for the computation of the insurance premium and are used in computing the amount of insurance available at the time of a fire. There is no provision in this policy for any audit by

the insurer. It is sufficient, we believe, to say that if the reports of values are made accurately the insured cannot be without insurance to the full extent of the value of his property, subject only to the limit of liability provided in the policy. In other words, if the appellee's reports for August, September, October and November, 1946, had been correct, it would have had insurance coverage available at all times up to \$195,000.00, being \$50,000.00 of non-provisional insurance which it reported and \$145,000.00 under the appellant's policy.

Before going into further details as to the meaning and operation of the provisions of the Standard Provisional Stock Form involved here (Tr. 19-24), we think it will be helpful to examine the few cases which exist on reporting forms of insurance, as they explain the theory on which such policies are written.

There are four cases, one a very recent one from this Court, to which we would like to call the attention of this Honorable Court. The first one is the case of *Atlantic Fruit Company vs. Hamilton Fire Insurance Co.*, 251 N.Y. 98, 167 N.E. 184 (1929). The opinion is by Mr. Justice Cardozo. The policy there involved was an open policy floater with a limit of liability for the contents of any one building and yard of \$25,000.00. Specific insurance was first to be deducted. The Court said:

"The premium due to the insurer is subject to variation, with variations in the coverage. A deposit premium of \$250 paid at the beginning is to be adjusted thereafter according to the value of the property at risk from day to day. 'The insured

shall keep a daily record of the total values and locations of the property at risk,' and of the 'specific or general insurance at the close of business every day,' and 'shall forward such reports monthly to W. Ward Smith, No. 1 Liberty Street, New York City.' Upon the termination of the policy 'the amounts at risk shall be averaged according to such reports and records,' and the premium due 'shall be figured on the average amount at risk so ascertained at the annual rate of one per cent.' "

There was a provision in the policy that any error or omission in rendering the monthly report of values should not operate to the disadvantage of the assured. Because of the burden of making and determining the daily values the assured elected after some time to fix the value on hand at the end of the month, add the purchases and deduct the sales, and report the remainder as the average. It was conceded that it was inaccurate and in addition substantial values were deliberately omitted. Mr. Justice Cardozo said:

"An insurer issuing such a policy has an interest in knowing the value and location of the property at risk to enable it to calculate the premium due from the insured, and to some extent for other purposes, as, for example, reinsurance.

"An intentional omission, if not itself a fraud, is at least such a departure from the contract as to supply an opportunity for fraud. Property so omitted will seldom be known to the insurer, and hence will seldom figure in the calculation of the premium. The insured, if there is no fire, saves the cost of the insurance, and, in the event of a loss, rectifies the omission, and declares that what was lost was at the risk of the insurer. The effect of errors and omissions must be adjudged in the light of these and kindred possibilities."

It is that very thing that the appellee seeks to do in this case. It says, "We made a mistake, but the consequences of that mistake, in the amount of \$16,563,35, we desire to pass on to you by the payment to you of a small amount in premium." The court held that an habitual understatement of property covered avoided the policy.

This decision was announced on May 28, 1929.

Within the last two years, however, there have been three cases involving reporting or provisional forms of insurance policies by the United States Courts of Appeals for the Ninth and Tenth Circuits. The first was the case of *Wallace vs. World Fire & Marine Insurance Co.*, 70 F. Supp. 193, which was affirmed by this Honorable Court on March 22, 1948, by a per curiam opinion (166 F. 2d 571) "on the grounds and for the reasons stated" in the opinion of the District Court. We therefore should examine this opinion carefully because we think that it is governing in this case and should have caused the trial court to find for the appellant and enter a judgment in its favor. The provisional reporting form policy in that case required monthly reports of value. Shortly before the fire, the plaintiffs reported that the property insured was worth \$2,000.00. Its actual value was \$28,140.00. The policy provision relative to the report of values was as follows:

"A. It is a condition of this policy that the insured shall report to this company on the last day of each month of the policy term the exact location of all property covered hereunder, the actual cash value of such property at each location, and the amount of specific insurance in force at each lo-

cation, all as of the last day of the month. However, a grace period of thirty (30) days shall be allowed for compilation and submission of such reports to this company.

B. If at the time of any loss, the insured has failed to file with this company, reports of value as above required, this policy, subject otherwise to all its terms and conditions, shall cover only at the locations and for not more than the amounts included in the last report of values filed prior to the loss; and further, if such delinquent report is the first report of values as required to be filed, this policy shall cover only at the location specifically named herein."

The learned trial judge in speaking of the time for the report said:

"A reading of this section (B) indicates that the period of grace for the filing of reports of values under no circumstances extends to a time after the fire loss, even if it is assumed that the thirty days grace period had not expired."

This is particularly enlightening in view of the words of the policy under consideration which provides that no changes may be made in the statement—which includes non-provisional insurance—unless made in writing and filed before a loss shall have occurred. (Par. 8, Tr. 23).

The insured in the *Wallace* case corrected his values within thirty days and attempted to collect the full amount of his loss. The insurer denied all liability and the trial judge, therefore, had to consider whether the misrepresentation or concealment was material and whether the understatement breached the policy so that

the entire policy was avoided. The trial court held that the policy did not provide for forfeiture and gave judgment to the plaintiff for the value it had most recently reported prior to the fire.

This was the very construction that appellant placed upon its policy in the instant case. At no time did appellant urge that the failure to report accurately or truthfully avoided its policy, but always that the consequences of it were that the insured's own statements were binding upon it in a determination of the amount of insurance available. That amount having been determined, the appellant paid it promptly.

We wish only to quote another short excerpt from this opinion as follows:

"Even if the statement of falsely low values would not be grounds for avoidance when the insurer protects himself with an 'honesty clause' and does not rely on its accuracy, nevertheless *some* figure must be given in order to create a base for calculating the liability after loss, and to adjust premiums. It is material that the declaration of values be within the period of grace, for if the insured could wait until the risk was past, and then understate the value of the property which had been subject to the risk, he would get the benefit of full coverage with an unjustly low premium."

The next case which had consideration by the Circuit Court of Appeals for the Tenth Circuit was *Automobile Insurance Co. vs. Barnes-Manly Wet Wash Laundry Co.*, 168 F. 2d 381 (1948). There fraud in the underreporting of gross receipts was found by a jury. There the trial court held, as the trial judge in the present

case held, that the measure of damages for the fraud was merely the balance of the premiums actually due. On appeal, a majority of the court held that the insured had to repay to the insurer a substantial sum of money (57% of \$211,410.56) which the insurance company had paid out in claims, for the reason that the insured had reported only 43% of its values and the insurance company had received only 43% of the premium which it was entitled to have. The court held (p. 385) that giving the insurer the premiums actually earned was wholly inadequate.

It is not possible to distinguish this case by saying that it has no applicability because there the plaintiff's actions were found to be fraudulent, while here the plaintiff's actions were the result of a mistake. Otherwise, what is a mistake today will be a cover for fraud tomorrow. The defendant in this case is just as much harmed by the reduction of premium paid to it, because of mere mistake, as it would have been harmed by a similar reduction due to a fraudulent overstatement of the amount of non-provisional insurance carried by the plaintiff.

The third case, also decided by the Tenth Circuit, is *Aetna Insurance Co. vs. Rhodes*, 170 F. 2d 111 (1948). In that case the first report of values had not been received and the question was whether the provisional amount of insurance stated in the policy was the amount of insurance applicable. The trial court and the court on appeal both so held. In the opinion of the United States Court of Appeals, that Court,

speaking through District Judge Broaddus, said:

“There is, however, a penalty for over-valuation under the premium adjustment clause of the policy as the amount of the premium is computed upon the average of the valuations shown in the reports. If the insured overstates the value of the property it goes into the total from which the average is determined and the premium calculated. As a result, the insured pays a premium on property he does not possess. Such is the working of the full reporting clause, and when so understood it will be seen that the failure to report, the reporting of over-values and the reporting of under-values carry their respective penalties. Under the rule that a policy will be reasonably construed to the benefit of the insured, no other penalty, such as forfeiture, may be presumed and none will be allowed.”

There is, however, no indication in any of these cases that the result of under-reporting will not be enforced.

II

The Judgment Below Disregards The Language of The Policy Involved Here

After noticing the theory of reporting policies—that they carry with them their own penalty for under-reporting, a diminution in the amount of the insurance recoverable—we return to the specific language involved in the present policy. We have seen that paragraph 3 reads as follows:

“The insured expressly agrees to file with the insurer * * * a true statement in writing of the value of the stock covered hereunder * * * and the

amount of any non-provisional insurance on any stock against the hazards covered hereunder."

It is admitted that the values reported were correct, that the assured reported \$50,000.00 of non-provisional insurance, and that in fact it only had \$33,333.33.

In the case already mentioned of *Automobile Insurance Co. vs. Barnes-Manly Wet Wash Laundry Co.*, 168 F. 2d 381, decided by the United States Court of Appeals for the Tenth Circuit on April 30, 1948, that Court had for consideration a reporting form of policy in which it was provided as follows:

"The Assured agrees to maintain and keep an accurate record of its business, and on or before the 10th day of each month to report to this company the total amount of its gross receipts (either collected or uncollected) from its business during the preceding month or such time as is within the policy period.

Of this provision Circuit Judge Phillips, speaking for the Court, said:

"The provision of the policy by which the Laundry Company agreed to maintain and keep an accurate record of its business and on or before the 10th day of each month report to the Insurance Company the total amount of its gross receipts from business during the preceding month was a promissory warranty. That promissory warranty the Laundry Company breached, but it afforded no ground for the cancellation of the policy because the Insurance Company affirmed the contract by continuing to pay the loss claims after knowledge of the fraud."

The fact that there was admitted fraud in the case

from which we have just quoted makes no difference in whether the provision of the policy was a promissory warranty. In our case although we firmly believe that the obligation to report truly the value of the stock on hand each Saturday in each month and the amount of any non-provisional insurance is a promissory warranty, we agree that the policy is not avoided for breach of the warranty, except perhaps in a clear case of fraud. In fact, it was not intended when the policy was prepared that an innocent report of values should work a forfeiture. The insurer in this instance did not intend when it drafted the form and it made no contention at any time during the determination of the loss or the pendency of this litigation that the filing of a report which was not a "true statement" would avoid its liability. It did contend and does contend that the report limits its liability because the insurer ought not to be required to furnish insurance for which the insured is not paying any premium.

Through the filing of the report of values under Paragraph 3 the insured orders such insurance as it wants. Unfortunately, if it makes a mistake it may not get all of the insurance that it wishes to have, but it gets the amount of insurance which it orders. And it has the right to make any change in its reports prior to a fire. So we do not believe that this case may be decided by the simple determination of whether any of the clauses in the policy were promissory warranties.

The consequences of a breach of the promissory warranty, whether it is material or not, is generally

accepted to be the breach of the contract. Here by agreement between the parties it is given a different consequence. By the filing of a statement in which the values reported are excessive, the assured pays a premium for something that it does not get. By the erroneous overstatement of the amount of its non-provisional insurance it reduces the amount of coverage under the provisional policy. It gets exactly what it asks for which, unfortunately, is an amount of insurance too little for its needs but which is the amount of insurance which it ordered and for which it agreed to pay. Under the policy sued upon in this case it is specifically agreed that no premium shall be charged on any value protected by non-provisional insurance. The assured could not be made to pay on an anniversary date for more insurance coverage than it obtained through the subtraction from its report of values on hand of the amount of non-provisional insurance, whether the amount of non-provisional insurance reported was accurate or not. (Par. 7, Tr. 22).

Having eliminated the harsh penalty for forfeiture for breach of a promissory warranty, the insurer should not be penalized and this contract, fair between the parties and unambiguous, should be enforced as written. The trial judge has made an entirely different contract through his ruling than the one entered into by the parties.

This Honorable Court recently affirmed a judgment entered in the trial court in the case of *Wallace vs. World Fire & Marine Insurance Company of Hartford*,

70 F. Supp. 193, saying (166 F. 2d 571):

“On the grounds and for the reasons stated in its opinion * * * the judgment of the District Court is affirmed.”

In relation to the result of under-reporting imposed by the reporting form of policy, the trial court said in that case:

“Where he diminishes his premium, he diminishes his potential recovery.”

And he said also:

“They cannot blow cold when their figures are to be used to compute premiums, and blow hot when they are to be relied on to compute the company’s liability.”

III

The Consequence of The Untrue Statement of The Amount of Non-Provisional Insurance Is To Reduce The Amount of Insurance Available to The Insured

The policy being provisional in character and affording only a provisional amount of insurance, contains a formula for the determination of the amount of insurance at the time of a loss. It is found in Paragraph 5 of the form. We have set forth this paragraph in the statement of the case and we have also set forth the appellant’s computation and application of this formula to the admitted figures, and for that reason we will not set them forth again.

We feel, however, that one of the most striking results of the application of this formula is that the insured actually had values on hand on January 9, 1947, not covered by specific (or "non-provisional") insurance in the amount of \$120,260.16 (Tr. 34). By virtue of having reported \$50,000.00 of specific insurance, the net values which he reported to appellant were \$103,593.49. Obviously, it under-reported as to value in the amount of \$16,666.67, and, unfortunately for it, was also under-insured to that extent. The premium, however, is based on that report, so that the insured is getting just what it intended to pay for.

We ask this Honorable Court to examine the forms furnished to the appellee by the appellant to be used in making its monthly report (Defts.'s Ex. 22, the originals of which were transmitted). This form starts out by saying:

"Following is a true statement of the actual cash values of all stocks * * * and all non-provisional fire insurance on such stock."

In the lower left hand corner, in large red letters, is the statement: "Under-reporting means under-insurance."

In this particular case appellant had also written to the appellee twice before the fire explaining to it the necessity of reporting accurately values and non-provisional insurance. (Deft.'s Ex. 25, Tr. 48, Deft.'s Ex. 26, Tr. 49).

By applying the formula set forth in paragraph 5 of the form, we first determine that the assured had a value of \$121,410.31. (This is agreed to by both parties).

It had reported values for November of \$103,593.49. (\$153,593.49—the average of the values on hand on each Saturday of the month—less \$50,000.00 on non-provisional or specific insurance as reported). Actually the value on hand was \$153,593.40 less \$33,333.33 of specific insurance—or \$120,260.16. Subtracting the value reported from the actual value (\$120,260.16—\$103,593.40) we get, of course, \$16,666.67 as the amount of value unreported to the appellant.

We have an agreed loss of \$121,410.31.

The calculation, therefore, of the amount of insurance is as follows:

Actual value of stock on hand January 9, 1947.....		\$121,410.31
Actual non-provisional insurance.....		33,333.33
		<hr/>
		88,076.98
Average Values on hand in November.....	\$153,593.49	
Non - provisional insurance in force.....	33,333.33	
	<hr/>	
Actual values not covered by non-provisional insurance	\$120,260.16	
Average values on hand in November	\$153,593.49	
Non - provisional insurance reported.....	50,000.00	
	<hr/>	

Values re- ported for insurance and prem- ium pur- poses.....	103,593.49
Values under-reported.....	16,666.67
Amount of insurance under appel- lant's policy.....	\$71,410.31

This amount appellant paid long ago and thereby discharged its entire obligation from the policy. There can be nothing more due.

There has not been a great deal of litigation involving the provisional or reporting form of insurance policy. It is a good policy, as we have said, tailored to the needs of the business man with a stock which fluctuates in value. It doesn't seem an unreasonable task to require the insured to report accurately his values and his non-provisional or specific insurance, nor does it seem that the insurance company has been harsh in saying your policy shall not be breached by the failure to report honestly, but you will not have, upon the happening of a loss, any more insurance than you have ordered and agreed to pay for, and you may not change the amount of insurance after the happening of a loss. Not only is the insured permitted by Paragraph 3 of the form to include in his report of values and estimate sufficient to cover errors or omissions (Par. 3, Tr. 20), but he is given the absolute privilege of making "any changes desired by him in the last previously filed statement re-

quired in Paragraph 3, if the changes are made in writing and filed before a loss shall have occurred." (Par. 8, Tr. 23.)

In this case it is clear that the statement rendered under Paragraph 3 of the "standard provisional stock form" is the basis upon which the premium is to be computed, except that if a loss occurs a premium for the unexpired portion of the policy here, based upon the amount of loss paid, shall at once be due and payable (Par. 9, Tr. 23). The premium earned prior to loss is definitely determinable by Paragraph 7 from the statement filed under Paragraph 3. Paragraph 7 (Tr. 22) refers not only to the "Average of Values filed with this Insurer" but also provides that no premium shall be charged "on any value protected by non-provisional insurance against the hazards covered hereunder *reported in accordance with paragraph 3.*" There is no provision for an audit and it appears from the four corners of the policy that the premium is to be determined upon the basis of the report made under paragraph 3. This report is under oath and includes the report of "the amount of any non-provisional insurance on said stock against the hazards covered hereunder." (Tr. 20.)

To hold, as the trial judge held in this case, that in the event of over-statement in the amount of non-provisional insurance the insurer's only remedy is to recover the unpaid premium, does violence to the sound reasoning of Circuit Judge Phillips of the Tenth Circuit in *Automobile Insurance Co. vs. Barnes-Manly Wet Wash*

Laundry Co., 168 F. (2d) 381 (1948), where he said, page 385:

“The judgment for the unpaid premiums in no wise compensated the Insurance Company for the fraud.”

Paraphrasing that language, the judgment for the unpaid premiums in the present case no wise compensates the insurance company for the increase of its hazard through permitting the insured to change its report after a loss has occurred.

The privilege given by paragraph 8 “to make any changes desired by him in the last previously filed statement required in paragraph 3” is subject to the express limitation which follows, “but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.” (Tr. 23.)

The effect of the judgment in this case is to permit the insured to make a change in its statement after a loss has occurred and thus to re-write the contract between the parties.

We submit that the judgment based upon the erroneous reasoning should be reversed.

CONCLUSION

For the reason that the appellee ordered but \$71,-410.31 of insurance from the appellant, which amount, adjusted slightly on account of salvage, has been paid, the judgment of the lower court should be reversed.

Respectfully submitted,

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In the United States
COURT OF APPEALS
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE
INSURANCE COMPANY, a corpora-
tion,

Appellant,

v.

GRANGE OIL COMPANY OF LINN
AND BENTON COUNTIES, a co-
operative corporation,

Appellee.

Appeal from a Judgment of the District Court of the
United States for the District of Oregon.

HONORABLE CLAUDE MCCOLLOCH, *Judge.*

BRIEF OF APPELLEE

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HONORABLE CLAUDE MCCOLLOCH, *Judge.*

BRIEF OF APPELLEE

JURISDICTION

Appellant has stated the basis for the jurisdiction of
this Court accurately. Appellee, therefore, adopts the
Statement of appellant as its own.

STATEMENT OF FACTS

This is an appeal from a judgment for appellee in an
action to recover the proceeds of a fire insurance policy.

Determination of this case will involve the construction of the Standard Provisional Stock Form, which is attached to the fire insurance policy issued by appellant to appellee. For the convenience of the Court a copy of this form is set forth as Appendix A to this brief. The form will be referred to herein by its initial letters, i.e., "S.P.S.F."

Appellee is a cooperative corporation organized for the mutual benefit of its members in marketing crops, including seed and feed. As part of its business it operated a seed processing and cleaning plant at Monroe, Oregon (Tr. 76). For the sake of convenience appellee will be referred to hereafter as "Co-op." Appellant is a mutual fire insurance company duly qualified to write policies of fire insurance in the State of Oregon. Appellant will be referred to hereafter as "Michigan."

Michigan issued its five-year provisional stock fire insurance policy (Pl. Ex. 1) on May 1, 1943. Before the occurrence of any of the events which are relevant to this case, the policy was assigned to Co-op with the consent of Michigan. The policy covered and insured against fire the contents of Co-op's frame warehouse and seed-cleaning plant at Monroe, Oregon, to the limit of \$145,000 for any one fire. The building is designated in the policy as "Plant No. 2." (Item No. 2, Amended Schedule Endorsement, Pl. Ex. 1.)

Michigan's policy differs from the ordinary policy of fire insurance in that it is designed to provide coverage for a fluctuating stock of goods in such a manner that the goods covered will be fully insured at all times to

the limit of liability provided in the policy, without their being over-insured at any time. Cf. *Federal Intermediate Credit Bank of Baltimore v. Globe-Rutgers Fire Insurance Company*, 7 F. Supp. 56, 58-59 (D. Md. 1934). Credit is advanced for the annual premiums because it is impossible to determine the amount of the property at risk until the end of the policy year. Only a "down payment" or "provisional premium" based on a "provisional amount" of insurance equaling 25 per cent of the limit of liability in the policy is payable at the beginning of the policy year (Tr. 125). The balance of the premium is payable upon the anniversary of the policy or at such time as the policy is canceled or otherwise terminated (S.P.S.F., Sec. 7).

By the terms of the policy Co-op agreed to send to Michigan each month a report of the value of goods on hand at the close of business on each Saturday of the month and to include in such report a statement of the amount of specific or nonprovisional insurance on the goods covered by the policy (S.P.S.F., Sec. 3). The premium earned under the policy was to be computed on the average of the values thus reported by Co-op except that no premium was to be charged on any "value" protected by specific or nonprovisional insurance (S.P.S.F., Sec. 7).

On January 9, 1947, a fire destroyed goods of Co-op in Plant No. 2 of a value of \$121,410.31. At that time the amount of specific or nonprovisional insurance in effect was \$33,333.33. Since the loss was well within the limits of liability of the policy, Co-op demanded that

Michigan pay to it the difference between the amount of the loss and the amount of specific insurance covering the goods destroyed, *i.e.*, the sum of \$88,076.98—less, of course, the amount of salvage.

Soon after the fire it developed that Co-op had inadvertently reported during the months of August, September, October and November of 1946 that it had in effect \$50,000 of nonprovisional insurance on the goods in Plant No. 2, although at the time of each report it actually had only \$33,333.33 of such insurance. The error was completely innocent and arose through a misunderstanding between Co-op and the agent for the specific insurers as to the amount of specific insurance furnished to cover the goods in Plant No. 2 (Tr. 82-121).

Co-op made due proof of loss and has tendered and offered to pay to Michigan whatever premiums may be due. Michigan has paid to Co-op the amount of \$70,966.89, which amount, after adjustment for salvage, represents the difference between the value of the goods destroyed and the amount of specific insurance inadvertently *reported* in the month of November, 1946. Michigan has at all times refused to pay to Co-op the difference between the value of the goods destroyed and the *actual* amount of nonprovisional insurance in effect on the date of the loss, an amount of \$88,076.98. Co-op brought this action to recover the sum of \$16,356.20, which, after adjustment for salvage, is the difference between \$88,076.98 and the amount actually paid by Michigan.

In its pleadings, at the pretrial conference and at the trial below, Michigan raised five principal defenses to this action. Two of its defenses were based upon the formula contained in S.P.S.F. Section 5 for computing the amount of insurance in effect at the time of the loss. Section 5 reads as follows:

“The amount of Insurance under this form, at any time, at any location described in the ‘Schedule Endorsement’, shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

“Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

“Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

“Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

“Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement’, at such location, the amount thus determined shall be the ‘Amount of Insurance under this form’.

“2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the ‘Limit of Insurance’ named in the ‘Schedule Endorsement’ at such location, the amount of the ‘Limit of Insur-

ance' so named shall be the 'Amount of Insurance under this form'."

The parties agreed that the "value" of the stock destroyed within the meaning of Section 5A was \$121,-410.31. Michigan, however, contended that the "amount of nonprovisional insurance" to be deducted in accordance with Section 5B was the amount of such insurance last *reported*, not the amount *actually in effect* at the time of loss (Tr. 34-35). Co-op contended that the "amount of nonprovisional insurance" referred to was the amount in effect at the time of the loss.

Michigan contended in the alternative that Section 5C should be so construed as to permit it to deduct from the value of the goods destroyed the amount of Co-op's error in reporting specific insurance. It contended that wherever the word "value" is used in Section 5C it should be taken to mean "value of stock less amount of nonprovisional insurance" (Tr. 33-34). Co-op contended that the language of Section 5C was unambiguous and that construing "value" to refer to anything but the value of stock would be contrary to the express terms of the policy.

Michigan's third defense was based upon the language of S.P.S.F., Section 3, which reads as follows:

"The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the 'Schedule Endorse-

ment', as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

Michigan contended that Co-op's agreement to file statements constituted a promissory warranty and that the inadvertent error in reporting the amount of non-provisional insurance constituted a breach of warranty which relieved it from liability (Tr. 10-13, 31-32). Co-op contended that the agreement was not a warranty because it was not stipulated that it be such in the manner required by the statutes and the decisions of the State of Oregon and therefore was only a simple covenant.

Michigan's fourth defense was based upon the language of S.P.S.F., Sections 7 and 8, which read as follows:

"7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the 'Limit of Liability Under This Policy', nor on any value protected by non-provisional insurance against the hazards covered hereunder reported in accordance with Paragraph 3.

"8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed statement required in Paragraph 3 but such

changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.”

Michigan contended that the quoted sections precluded it from collecting a premium for the amount of specific insurance over-reported and, therefore, it had received no consideration for the coverage claimed by Co-op (Tr. 16-18, 35-36). Co-op denied that the quoted sections precluded Michigan from collecting the full premium due it and contended that Michigan could collect the balance of its premium in any event in an action for breach of the promise to file statements contained in Section 3, even though such breach was inadvertent.

As its last defense Michigan contended that by reason of Co-op's inadvertent error in reporting specific insurance, Co-op was estopped to claim that it had less insurance on Plant No. 2 at the time of the loss than it reported in the four preceding months (Tr. 13-15, 17). Co-op contended, *inter alia*, that it was not estopped because its error was an innocent one and because Michigan had taken no substantial action in reliance thereon.

Following trial on May 28, 1948, the matter was submitted to the court on briefs and oral argument. After full consideration of the matter the court entered judgment for Co-op on September 20, 1948, in the principal amount of \$16,356.20, together with interest and costs and attorney's fees in the amount of \$1500.

SUMMARY OF ARGUMENT

While Michigan has not made the matter entirely clear, insofar as we are able to ascertain there is only one issue remaining in this case on this appeal: Does S.P.S.F., Section 5C, permit Michigan to deduct from the amount of Co-op's loss the amount of Co-op's error in over-reporting nonprovisional insurance? Specifically, the issue is whether the word "value" wherever used in S.P.S.F., Section 5C, may be construed to mean "value of stock less amount of non-provisional insurance."

Michigan now concurs in Co-op's construction of S.P.S.F., Sections 5A and 5B, which read as follows:

"5. The amount of Insurance under this form, at any time, at any location described in the 'Schedule Endorsement', shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

"Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

"Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock."

Michigan has abandoned its contention that the words "amount of any non-provisional insurance" used in Section 5B mean "amount of non-provisional insurance last reported" (App. Br. page 13, line 3). Michigan now agrees that Section 5B requires that from the value of the goods destroyed, *i.e.*, \$121,410.31, the amount of specific insurance *actually* in effect at the date of the loss must be deducted, *i.e.*, \$33,333.33. The difference is \$88,076.98 which, less agreed adjustments for salvage,

is the amount for which Co-op contends Michigan became liable because of the fire.

Section 5C reads as follows:

“If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.”

Michigan apparently contends that the word “value” wherever used in Section 5C can and should be construed to mean “value of goods less amount of specific insurance.” Under such a construction Michigan would be entitled to deduct from \$88,076.98 the sum of \$16,666.67 which is the amount of Co-op’s error in reporting nonprovisional or specific insurance. Co-op contends that the word “value” as used in Section 5C and throughout the entire policy clearly refers only to the value of Co-op’s stock of goods. The word “value” must be given the meaning provided in the policy definition of the word “value” contained in S.P.S.F., Section 4.

“It is further agreed that wherever the term ‘value’ is used in this form it shall apply in the manner set forth in section (4a), (4b) and (4c) below as the location and at the time when such ascertainment of value is required by the conditions of this policy.

“(4a) The *value of stock*, other than that manufactured by the insured, held for local or retail sale

or for manufacturing purposes shall be the cost of replacing such stock;

“(4b) The *value of stock*, other than that manufactured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality;

“(4c) The *value of stock* manufactured by the insured shall be the average carlot selling price.”
(Italics supplied)

“Value” as defined in Section 4 means value of stock.

The language of Section 5C is clear and unambiguous and under well settled principles of insurance law must be given effect as written. Even where there is an ambiguity in an insurance policy it is well settled that the ambiguity must be resolved in favor of the insured. To rewrite the unambiguous language of Section 5C after a loss so as to restrict the rights of Co-op would be to depart from the most fundamental principles of insurance law.

Michigan has completely abandoned its contention that Co-op is estopped to claim that it is entitled to the “amount of insurance” which the policy provides shall be in force. Michigan has not mentioned the defense based on estoppel in its brief.

Michigan also has abandoned its defense based upon the premise that it is unable to collect premiums against the amount of specific insurance over-reported. While Michigan still contends that it is unable to collect the full premium due it, it has made no effort to connect its professed disability with any legal theory of defense.

Co-op contends that Michigan has an adequate right under the policy to collect premiums for the full amount of the risk which it carries.

For practical purposes, Michigan also has abandoned its defense based upon the theory that Co-op has been guilty of breach of a promissory warranty. While Michigan still contends that the agreement contained in S. P. S. F., Section 3, constitutes a warranty, it concedes that any breach of the "warranty" did not void the contract and that its liability in any event must be determined according to the "agreement between the parties" (App. Br. 32). The "agreement" referred to can only be S. P. S. F. Section 5C. In order to dispel the confusion which might arise if its agreement were considered to be a warranty, Co-op will demonstrate that the agreement cannot be construed as a warranty under the statutes and decisions of the State of Oregon.

Michigan has admitted that Co-op's error in reporting nonprovisional insurance was completely innocent and untainted with fraud. Yet Michigan argues that this Court should apply to this case the principles governing cases in which there is fraudulent mis-reporting—apparently on the theory that such an extension of the law of fraudulent misrepresentations would have a prophylactic effect which would be beneficial to companies issuing the provisional type policy. Co-op contends that it cannot be penalized for a fraud where it has committed no fraud. The first paragraph of the standard terms and conditions on page 2 of the policy provides a remedy for Michigan in the event of fraud (Pl. Ex. 1). Since

Michigan has made no attempt to bring itself within this paragraph, Co-op is entitled to the full amount of its insurance.

PROPOSITION OF LAW I

**By the Terms of Its Policy Michigan Is Liable for
All of Co-op's Loss Not Protected by
Nonprovisional Insurance.**

POINTS AND AUTHORITIES

1. When the terms of an insurance policy are clear and unambiguous, the policy must be given effect as written.

Smith v. Germania Fire Ins. Co., 102 Or. 569, 578, 202 Pac. 1088, 1091 (1922);

Massachusetts Mut. Life Ins. Co. v. Pistolesi, 160 F. (2d) 668 (C.C.A. 9th 1947);

Bradley v. Prudential Ins. Co. of America, 70 F. (2d) 988, 989 (C.C.A. 9th 1934);

Kaifer v. Georgia Casualty Co., 67 P. (2d) 309, 310 (C.C.A. 9th 1933);

Canton Ins. Office v. Independent Transp. Co., 217 Fed. 213 (C.C.A. 9th 1914).

2. When the terms of an insurance policy are ambiguous, the ambiguity must be resolved against the underwriter.

Bennett v. Metropolitan Life Ins. Co., 173 Or. 386, 411, 145 P. (2d) 815, 825 (1944);

Yoshida v. Security Ins. Co., 145 Or. 325, 334, 26 P. (2d) 1082, 1086 (1933);

Purcell v. Washington Fidelity National Ins. Co.,
141 Or. 98, 103, 16 P. (2d) 639, 641 (1932);

*Aschenbrenner v. United States Fidelity and
Guaranty Co.*, 292 U.S. 80, 84, 54 Sup. Ct.
590, 592 (1934);

Stipcich v. Metropolitan Life Ins. Co., 277 U.S.
311, 322, 48 Sup. Ct. 512, 515 (1928);

New York Life Ins. Co. v. Hiatt, 140 F. (2d)
752 (C.C.A. 9th 1944);

Swasey v. Massachusetts Protective Assn., 96 F.
(2d) 265 (C.C.A. 9th 1938).

3. The language of S.P.S.F., Section 5C, is clear and unambiguous and does not permit Michigan to penalize Co-op for its innocent error in reporting the amount of nonprovisional insurance.

ARGUMENT

Michigan's position in this case is indeed a novel one for an insurance company. Michigan, in effect, is asking this Court to disregard the express language of its policy on the ground, *inter alia*, that the policy as now written "violates the theory underlying reporting forms of insurance." To so depart from the language of the policy would violate rules for the construction of insurance policies long and well established in both this Court and in the Supreme Court of the State of Oregon. Since the jurisdiction of this Court is based upon diversity of citizenship the outcome of this case must depend upon the law of the State of Oregon. *Erie Railroad Co. v. Tomkins*, 304 U.S. 64, 58 Sup. Ct. 817 (1938).

When the language of an insurance policy is clear

and unambiguous, the policy must be given effect as written. The Supreme Court of Oregon in construing a policy has held:

"5. The terms and conditions of the policy under consideration are not vague, nor ambiguous, but are clear and definite. Therefore, this court cannot resort to construction, nor can we write a new contract of insurance as between the parties." *Smith v. Germania Fire Ins. Co.*, 102 Or. 569, 578, 202 Pac. 1088, 1091 (1922).

This Court said in *Bradley v. Prudential Ins. Co. of America*, 70 F. (2d) 988 (1934) at page 989:

"(2, 3) Policies of insurance, where the terms are clear and unambiguous, must be enforced like other contracts according to terms which have been used therein by the parties."

If the policy in this case were ambiguous, the ambiguity would have to be resolved against Michigan. In *Yoshida v. Security Ins. Co.*, 145 Or. 325, 26 P. (2d) 1082 (1933), the Oregon Supreme Court in speaking of the policy there involved said:

"The instrument under consideration was prepared by the insurance company and therefore all ambiguities must be resolved against it."

In *New York Life Ins. Co. v. Hiatt*, 140 F. (2d) 752 (1944), this Court said:

"(1-3) The rules applied in the construction of insurance contracts are well understood. Like any contract, the policy is to be read as a whole, and if possible the several parts should be reconciled and given effect. 14 Cal. Jur. 440, § 22. Because contracts of insurance are not the result of negotiation

and are generally drawn by the insurer, any uncertainties or ambiguities therein are resolved most strongly in favor of the insured."

In *Aschenbrenner v. United States Fidelity and Guaranty Co.*, 292 U.S. 80, 84, 54 Sup. Ct. 590, 592 (1934), the Supreme Court of the United States has held:

"The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policyholder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, *Stipcich v. Metropolitan Life Insurance Co.*, 277 U.S. 311, 322, 48 S. Ct. 512, 72 L. Ed. 895; *Mutual Life Insurance Co. v. Hurni Packing Co.*, 263 U.S. 167, 174, 44 S. Ct. 90, 68 L. Ed. 235, 31 A.L.R. 102; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports."

The extent of the liability of Michigan under its policy depends upon the "amount of insurance" in effect at the time of the loss. Section 5 of the Standard Provisional Stock Form attached to the policy contains a formula for the computation of the amount of insurance in effect at such time. Section 5 reads as follows:

"The Amount of Insurance under this form, at any time, at any location described in the 'Schedule Endorsement', shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

"Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

"Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

"Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays.

"Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the 'Limit of Insurance' named in the 'Schedule Endorsement', at such location, the amount thus determined shall be the 'Amount of Insurance under this form'.

"2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the 'Limit of Insurance' named in the 'Schedule Endorsement' at such location, the amount of the 'Limit of Insurance' so named shall be the 'Amount of Insurance under this form'."

The parties agree that the value of stock at the time of the loss, within the meaning of Section 5A was \$121,-410.31. The parties agree that the amount of nonprovisional insurance in effect at the time of the loss, within the meaning of the provisions of Section 5B was \$33,-333.33. The parties agree further that the amount of \$88,076.98, the difference resulting from the deduction from the value of the goods, in accordance with Section 5B of the amount of nonprovisional insurance is less than the "limit of insurance" within the meaning of

Section 5D. It would seem clear therefore, and Co-op so contends, that Michigan's liability was \$88,076.98, less adjustment for salvage.

For some reason not made clear to us, Michigan contends, however, that Section 5C entitles it to a further deduction in computing the amount of insurance. Section 5C as we read the policy has no application to this case. By its terms it applies only to a case where an insured errs in reporting the value of its goods. As now written, Section 5C reads:

"If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated amount, if any) and the average of actual values as ascertained for the same Saturdays."

The "Statement of value" referred to is obviously the "true statement in writing of the value of the stock" mentioned in Section 3. Michigan would have this Court rewrite Section 5C by inserting the words in italics below:

"If through error, omission, or otherwise, *the value of goods less the amount of specific insurance reported in* the statement of value last filed by insured in accordance with the provisions of paragraph 3 shall be less than the actual value *less the actual amount* as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Section 5A and 5B

shall be further reduced by the difference between the average of value so filed (including estimated amounts if any) and the average of actual values as ascertained for the same Saturdays, *and by the difference between the average amount of provisional insurance reported upon the same Saturdays and the actual amount of insurance in effect on such Saturdays.*" (Italics supplied)

There is no ambiguity in the provisions of Section 5C. It is completely clear that when the word "value" is used in that section the word refers to the value of stock and not to the amount of specific insurance or to the value of stock less the amount of specific insurance. In section 4 of the Standard Provisional Stock Form "value" is expressly defined as follows:

"It is further agreed that wherever the term '*value*' is used in this form it shall apply in the manner set forth in section (4a), (4b) and (4c) below as the location and at the time when such ascertainment of value is required by the conditions of this policy." (Italics supplied)

Sections (4a), (4b) and (4c) are as follows:

"(4a) The *value of stock*, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock;

"(4b) The *value of stock*, other than that manufactured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality.

"(4c) The *value of stock* manufactured by the insured shall be the average carlot selling price." (Italics supplied)

It will be seen that they refer only to the value of stock. Hence, "value" wherever used in the policy is synonymous with "value of stock".

The phrase "average of value" used in Section 5C is used again in Section 7. In Section 7 it is provided that premiums shall be determined based upon the "average of values filed . . . but no premium shall be charged . . . on any value protected by nonprovisional insurance . . ." In Section 7 it is very clear that when the policy speaks of "average of values" it refers to the average of the value of the stock on hand on pertinent days. Otherwise it would not have been necessary to provide that no premium would be charged on a "value" protected by nonprovisional insurance. Surely Michigan did not intend that the words "average of value" as used in Section 5C should have a meaning different from the very same words when used in Section 7.

The other sections in the form in which the word "value" is used are Section 3 and Sections 5A and 5B. In Section 3 the word "value" is used with reference to the worth of a stock of goods, while the word "amount" is used with reference to the quantity of nonprovisional insurance in force. Michigan concedes in its brief that the word "value" as used in Sections 5A and 5B refers to the value of stock. See first three lines of calculation contained in the third full paragraph of page 35 of Michigan's brief. There is nothing to indicate that "value" has a different meaning in Section 5C than in Section 3 or Sections 5A and 5B. Rather, it is clear that *wherever* in the policy Michigan used the word "value"

it used it consistently with the policy definition contained in Section 4.

Michigan's forms "Report of Actual Cash Values", furnished to Co-op by Michigan for mutual convenience are, of course, not part of the policy and do not control its construction (Def. Exs. 19, 20 and 22). However, use of the word "value" in that form as synonymous with "value of stock" is consistent with the policy definition of value and corroborates such an interpretation of the word as it is used in 5C. The statement on such forms included by Michigan for subscription by its insured reads as follows:

"Following is a true statement of the actual cash values of all stocks located at the stations and in the buildings designated in the first column at the close of business upon each Saturday for the month of _____, 19_____, as required under Paragraph 3 of the form attached to our Provisional Policies, and all Non-Provisional Fire Insurance on such stock.

"We understand that if the average of the values entered in this statement is less than the average of actual cash values for the same days for which this statement is filed, the difference, in case of loss, shall be deducted from the actual cash value at the time of such loss, and the remainder (after deducting Non-Provisional Insurance, if any) shall constitute the actual amount of insurance in force under all policies covering under the Provisional Form, subject, however, to all of the conditions and limitations of such policies."

In the first paragraph an insured states that it is making a true statement of the actual cash *values of stock*. In the second paragraph the single word "values"

is used as a shorthand expression for the phrase "values of all stocks" used in the first paragraph. The insured agrees that if the average of values reported is less than the average of actual cash values on the days for which values are reported, the difference, in the event of loss, shall be deducted from the actual cash value at the time of loss. From the result "nonprovisional insurance" shall be deducted to obtain the actual amount of insurance in force. Here again it would not be provided that the amount of nonprovisional insurance be deducted if "value" was intended to mean value of stock less amount of insurance. It is not specified that the *reported* amount of nonprovisional insurance shall be deducted. It is clear that within the meaning of this paragraph it is intended that the *actual* amount of nonprovisional insurance be deducted. The second paragraph quoted above is obviously intended to paraphrase the provisions of Section 5C of the Standard Provisional Stock Form. In drafting such paraphrasization it is clear that Michigan did not intend the word "value" to mean value of stock less amount of insurance. It is clear that Michigan had no such intention in drafting the provisions of Section 5C.

Michigan relies upon the warning in the lower left-hand corner of the form: "Under-reporting means under-insurance." "Under-reporting," however, must refer to reporting of the value of stock. Michigan is here relying upon an *over-reporting* of nonprovisional insurance as the basis for its contention that Co-op was under-insured.

Michigan relies upon the letters of Mr. N. J. Sankela,

Michigan's assistant branch manager, set forth on pages 48 and 49 of the transcript. In both of these letters, however, Mr. Sankela used the word "value" to refer to the value of stock and not to the value of stock less amount of specific or nonprovisional insurance.

Construing the word "value" to mean value of stock less amount of specific insurance requires such a departure from the common meaning of the word and from the policy definition that Michigan has not been able to use the word consistently in its brief in the sense that it professes to construe it (App. Br. 8, 9, 10, 21, 22, 30, 36).

Michigan has obviously used great care in the preparation of its Standard Provisional Stock Form. While in the process of preparing this form it probably considered very carefully whether or not it should impose a penalty or forfeiture because of an inadvertent error in the reporting of an amount of specific insurance. There is good reason for Michigan to have concluded that it should insist on complete accuracy in the reporting of the value of a stock of goods while being less strict about the amount of specific insurance. The amount of specific insurance does not fluctuate widely like the value of stock and can, of course, be readily and easily checked. Michigan is a specialist in dealing with insurance but probably knows relatively little about the feed and seed business.

Michigan argues that applying the formula contained in Section 5 as written would be very unfair to it in that it is precluded by Section 7 from collecting a pre-

mium on any other basis than the reports furnished by Co-op pursuant to Section 3. Applying Section 7 to the present case, Michigan contends that in computing the premium a deduction of \$50,000 for the amount of nonprovisional insurance reported for the months of August through November, 1946, must be made from the value of the stock of goods reported during those months. It follows, Michigan maintains, that Michigan earned a premium only for an amount of insurance equal to the sum that it has already paid plaintiff.

The argument of Michigan is hypertechnical and requires a strained and unnatural construction of Section 7. Nothing in Section 7 precludes Co-op from changing its report. Section 8, upon which Michigan relies, seems designed to give an assured the right to reduce its premiums in the event that it has overvalued its stock of goods as it is permitted to do under the provisions of Section 3.

There is no reason for laboring over the construction of Sections 7 and 8, however, for Michigan clearly has the right to collect whatever premium may be due it under the provisions of Section 3. In Section 3 Co-op agreed to report the true amounts of nonprovisional insurance on the designated days. Since it failed to report the amounts accurately, Michigan has a remedy for the nonperformance of Co-op's promise by way of action for breach of contract. The damages will, of course, be the difference between the premium earned had the report been accurate and the premium on the basis of the report as submitted. RESTATEMENT, CONTRACTS, Section 329.

In this case it will not be necessary for Michigan to bring an action, for Co-op has tendered and will pay whatever premium is due. So in the normal case an insured upon discovering an honest error will pay whatever premium Michigan tells it is due. This case must not be confused with fraud cases in which entirely different rules apply.

Michigan has likened Co-op's monthly reports to "orders" for insurance. Actually the reports bear no resemblance whatever to orders. To illustrate, suppose that an assured on the 10th day of a particular month reports that on each of the four preceding Saturdays it had a value of goods on hand in the amount of \$200,000 and had specific insurance in effect in the amount of \$100,000. On the day that it renders its report it cancels its specific insurance without notifying Michigan. (Nothing in the policy requires an insured to notify Michigan when it cancels specific insurance.) Providing that the value of the goods on hand is within the limits of liability of the policy, the assured immediately will have insurance in force in the amount of \$200,000 (Tr. 74-75). The assured can hardly be said to have "ordered" \$200,000 of insurance by filing its report.

Since the "Standard" Provisional Stock Form used by Michigan is peculiar to Michigan (Tr. 138), it is not surprising that there are no decisions directly controlling the outcome of this case. None of the cases cited by Michigan in its brief and none that Co-op has found deals with errors in the reporting of the amount of specific insurance. Each of the mis-reporting cases cited by

Michigan involves either fraudulent or deliberate misreporting of the value of a stock of goods. It is highly misleading to attempt to apply those cases, or portions of the decisions thereof, to this case which involves an inadvertent error with respect only to nonprovisional insurance.

In *Atlantic Fruit Company v. Hamilton Fire Insurance Company of New York*, 251 N.Y. 98, 167 N.E. 184 (1929), the insured *intentionally* failed to report the value of goods in the manner specified in the policy. In addition the insured *deliberately* left out of its report whole classes of goods. Like our policy, the policy there involved contained a provision that insured should report periodically the values of goods on hand and the amount of specific insurance covering the goods. Rather than having a provision like Section 5C of Michigan's policy, the policy there involved provided that any error or omission in rendering the monthly report of values should not operate to the disadvantage of the insured. The court held that

“ . . . a breach of covenant, so wilful, so substantial and persistent puts an end to the insurance.”

After considering the case of *Arnold v. Pacific Mutual Insurance Company*, 78 N.Y. 7 (1879), which held that an error in reporting the routing of a vessel did not vitiate a policy of marine insurance, the court said:

“We do not need to consider whether there would be a like ruling in this court if the failure to make a report were found to be the result of an excusable mistake. Dicta in the Arnold case, supra,

at page 13 of 78 N.Y. gives color of support for a less rigorous conclusion. We cannot doubt, however, that forfeiture must follow where the failure to report has been persistent and deliberate.”

That case involving the effect of deliberate and wilful omissions of values of goods does not control our case, which deals with the effect of an innocent error in reporting specific insurance.

In *Automobile Insurance Company of Hartford Connecticut v. Barnes Manley Wet Wash Laundry Company*, 168 F. (2d) 381 (C.C.A. 10th 1948), an insurance company brought an action for deceit against its policyholder, a laundry. Plaintiff's policy insured defendant's laundry patrons against loss by fire. The premium was based upon the gross receipts of the laundry. A fire had occurred and plaintiff had satisfied the claims of the persons whose laundry was destroyed. The policy was a reporting type and the jury found specially that assured had wilfully and knowingly and with intent to defraud and deceive misrepresented to the insurer that its gross receipts were substantially less than the actual receipts. The issue before the court was the determination of the measure and amount of damages in an action for deceit. The court held that the insurer was entitled to recover the difference between the risk actually carried and the maximum risk the insurer would have carried had the reports been true. It is clear that the decision has no application to this case. Rather the case suggests to Michigan what its remedy might be in a fraud case.

In *Wallace v. World Fire and Marine Insurance Company*, 70 F. Supp. 193 (S.D. Cal. 1947), *aff'd* 166 F. (2d) 571 (C.C.A. 9th 1948), an insurance company sought to avoid liability on a value reporting policy on the ground that insured had fraudulently misrepresented the value of his stock of goods. The insured had reported only \$2000 of property at a time when the actual value was \$28,140, or over 14 times the amount reported. The court held that the misrepresentation did not avoid the policy, because under the circumstances it was not material. The "full reporting clause" contained the agreement of the parties as to the effect of an error in reporting the value of the stock of goods.

The court did not set out in its opinion the language of the full reporting clause, so we are unable to determine what degree of similarity there is between the clause involved in that policy and Section 5C of our policy. However, even if the clauses were identical, the *Wallace* case would not control our case because there the error was in reporting *value of stock* and not the amount of specific insurance. It is clear that this Court rested its decision in the *Wallace* case on the language of the policy. Moreover, from the language of the Court in that case it seems quite likely that the record suggested fraud or such gross negligence as to create doubt at least of the assured's good faith. Statements of the court as to the effect of a material misrepresentation or concealment have no relevance to this case, since in our case Michigan has made no effort to avoid the policy on the ground of fraudulent misrepresentation. The decision in our case depends only upon the construction

of the policy and not upon the application of an extrinsic rule of law.

PROPOSITION OF LAW II

The Error in Reporting Did Not Constitute a Breach of Warranty.

POINTS AND AUTHORITIES

1. Co-op's agreement to file statements cannot be construed as a warranty since the agreement was not inserted in the policy in the manner required by the statutes of the State of Oregon.

Or. Comp. Laws Ann., Sec. 101-1801.

2. The agreement cannot be construed as a warranty since the parties have not stipulated that it be such.

Walker v. Firemen's Fund Insurance Co., 114 Or. 545, 559, 234 Pac. 542, 546 (1925);

12 APPLEMAN, INSURANCE LAW AND PRACTICE (1943) 444;

RICHARDS, LAW OF INSURANCE (4th Ed. 1932) 144;

Aetna Ins. Co. v. Rhodes, 170 F. (2d) 111 (C.C.A. 10th 1948);

Spence v. Central Accident Ins. Co., 236 Ill. 444, 86 N.E. 104 (1908);

Business Men's Assur. Co. of America v. Mariner, 223 Mich. 1, 193 N.W. 907 (1923).

3. Whether or not the agreement be construed as a warranty, the outcome of this case will depend upon the

construction of Section 5C of the Standard Provisional Stock Form.

ARGUMENT

We understand Michigan to have abandoned its defense to this action based upon breach of warranty. While Michigan still contends that Co-op's agreement to furnish reports constituted a promissory warranty, Michigan concedes that the result of this case will depend upon the interpretation of Section 5C of the policy, whether or not there has been a breach of warranty. On page 31 of its brief Michigan states:

"In our case although we firmly believe that the obligation to report truly the value of stock on hand each Saturday in each month and the amount of any non-provisional insurance is a promissory warranty, we agree that the policy is not avoided for the breach of the warranty, except perhaps in a clear case of fraud. In fact, it was not intended when the policy was prepared that an innocent report of values should work a forfeiture

"So we do not believe that this case may be decided by the simple determination of whether any of the clauses in the policy were promissory warranties.

"The consequences of a breach of the promise or warranty, whether it is material or not, is generally accepted to be the breach of the contract. Here *by the agreement between the parties* it is given a different consequence." (Italics supplied)

The only "agreement" between the parties in Michigan's policy having reference to the effect of an error in reporting is found in Section 5C.

Co-op's promise to furnish reports certainly is not a warranty. Because of Michigan's present view of the case, however, it is not necessary to dwell at great length upon the reasons why the agreement cannot be construed as a promissory warranty. We will endeavor only to remove the confusion which may result in this case from Michigan's insistence on continuing to refer to Co-op's agreement as a warranty.

A warranty is a stipulation in an insurance policy that unless a certain thing be so or happen or be done, the underwriter will not be liable at all on its policy. See *Walker v. Firemen's Fund Insurance Company*, 114 Or. 545, 559, 234 Pac. 542, 546 (1925). A warranty is like a condition precedent in an ordinary contract except that through long usage, an underwriter is completely relieved of liability unless the warranty is exactly and literally complied with. *Buford v. New York Life Insurance Company*, 5 Or. 334 (1874). In an ordinary contract a promise will often be enforced if there has been only substantial performance of the conditions precedent, or if the breach of condition is not material. RESTATEMENT OF CONTRACTS, Secs. 274-279.

The law of warranties grew up around marine insurance, the earliest form of insurance, as it was practiced at Lloyds Coffee House, and was extended to other forms of insurance as they developed. Note, 36 HARV. LAW REV. 597 (1923). Strict enforcement of warranties in most other types of policies was so unfair and so inappropriate that both courts and legislatures soon began to modify the rigors of the law. Oregon, for example,

enacted a statute providing that statements in an application for a policy should be deemed representations, not warranties. O.C.L.A., Sec. 101-131 (1940). A representation differs from a warranty in that an underwriter cannot avoid a policy for misrepresentation unless it can show that the representation was knowingly false, was made with intent that it be relied upon, and was material to the risk. *Waller v. City of New York Ins. Co.*, 84 Or. 284, 294, 164 Pac. 959, 962 (1917).

Oregon also enacted a statute, Or. Comp. Laws Ann., Sec. 101-1801 (1940), which completely precludes Michigan from contending that Co-op's agreement in Section 3 of the Standard Provisional Stock Form constitutes a warranty. After providing the standard conditions to appear in a fire insurance policy, the legislature provided for the inclusion of other conditions as follows:

"Provisions for other conditions.

"Provided, however, that any fire insurance company, corporation, or association, its officers or agents, may add to such conditions other conditions, provisions, and agreement not in conflict with law, or contrary to public policy; but if such conditions restrict, or abridge the rights of the assured under the policy contract, each restrictive clause must be preceded by a sufficiently explanatory title printed or written in type not smaller than eight-point capital letters. . . ."

Co-op's agreement to furnish reports is not part of the Oregon standard form of fire insurance policy. It was not placed on the first page of the policy, nor was it preceded by an explanatory title in type not less than eight-point capital letters. If construed as a warranty, it

certainly would be a condition restricting Co-op's rights under the policy. It follows that the statute precludes the agreement from being construed as a condition or warranty.

Even if the Oregon statute were not in force, Co-op's agreement could not be construed as a warranty. The universal rule for the construction of fire policies is that provisions of the policy will not be construed as warranties or conditions unless the parties have stipulated that they be such. See, for example, *Walker v. Firemen's Fund Ins. Co.*, 114 Or. 545, 559, 234 Pac. 542, 546 (1925), where it is said:

"It has been frequently held that, where a written application states a thing absolutely to be true, and such statement is of a material fact, it will be construed as a warranty, even if the fact should not be material, and this is upon the theory that as both parties have agreed that it should be a warranty, the courts will not disregard a contract to that effect and hold what the parties have thus stipulated a warranty to be a mere representation. But courts are loath to hold that to be a warranty which the parties have not stipulated shall be such . . ."

Similarly, in 12 APPLEMAN, INSURANCE LAW AND PRACTICE (1943), 444, the rule is stated:

"Warranties are not favored by construction, and it is not error to so instruct the jury. Where the insurer relies upon a breach of warranty as a defense, it will be strictly construed against the company, with a view of avoiding forfeitures on technical grounds. The statement will not, therefore, be construed to be a warranty *unless made so by express agreement in clear and unequivocal language*. If any other possible interpretation or con-

struction is open to the court, it will adopt a more liberal view, and will only construe a statement to be a warranty when no alternative remains." (Italics supplied)

RICHARDS, LAW OF INSURANCE (4th Ed., 1932), states at page 144:

"Fire, life and accident policies are for the most part explicit in describing what provisions to go to the validity of the contract, and the courts are slow to construe as warranties any others than those so defined, . . . "

Since there is no stipulation, provision or agreement in Michigan's policy that Co-op's agreement to furnish reports shall constitute a condition or warranty, the agreement must be construed as a simple covenant rather than a promissory warranty,—this, even if there were no Oregon statute specifically controlling the matter.

The dicta in *Automobile Insurance Company of Hartford Connecticut v. Barnes Manley Wet Wash Laundry Company*, 168 F. (2d) 381 (C.C.A. 10th 1948), construing the reporting clause there involved as a warranty has no bearing on this case. First, it does not appear that Oklahoma has a statute similar to the portion of O.C.L.A., Sec. 101-1801, quoted above. Second, it was specifically provided in the policy there involved that:

" . . . any evasion or attempted evasion by the assured in the matter of rendering such reports hereinbefore required, or payment of premium hereunder, shall be an absolute defense to any suit or action brought under this policy."

There is no such provision in the policy involved in this case, nor any words or language of similar import. Similarly, that a reporting clause was called a warranty in *Atlantic Fruit Co. v. Hamilton Fire Ins. Co.*, 251 N.Y. 98, 167 N.E. 184 (1929), cannot affect this case since this case must be determined on the basis of the Oregon law and of the particular provisions of Michigan's policy. In our case, as in *Aetna Ins. Co. v. Rhodes*, 170 F. (2d) 111 (C.C.A. 10th 1948), there is no provision for forfeiture in the event of breach of the agreement to furnish reports. As in the *Aetna* case the agreement cannot be construed as a warranty.

CONCLUSION

Co-op agrees that the type of policy here involved is very useful to persons wishing to insure a fluctuating stock of goods. The advantages to an assured probably compensate for the ten per cent higher premium rate (Tr. 125). Enforcing such policies as written fosters, rather than discourages, the use of such policies, for only if an assured can rely upon the protection which the policy specifies he shall have, is he afforded the relief from insurance worries for which the policy is designed. If Michigan is dissatisfied with its policy as it is presently written, it may for the future change the policy to include whatever provisions it chooses. If it wishes, it may impose a penalty for inadvertent errors in reporting amounts of specific insurance. If it desires, it may provide that failure to furnish completely accurate reports shall constitute a breach of warranty. It has not

done so, however, and can hardly expect this Court to rewrite the contract so as to include penalties or forfeitures not specified or contemplated when the insurance went into effect.

In this case Michigan has not by any act or failure to act on the part of the assured involuntarily been forced to assume a risk that it did not undertake in the first instance to assume. In fact, the limits of liability assumed by Michigan on this very stock of goods was \$145,000, an amount far in excess of the amount Co-op is demanding that Michigan pay. Co-op was under no obligation to get additional insurance where the risk and value of the property did not exceed this sum of \$145,000. That it did secure a substantial amount of additional insurance reduced the loss of Michigan \$33,333, and this below the loss of the \$120,656.42 which is substantially \$24,000 below the limits of Michigan's risk that it agreed to assume on this property. The element of involuntarily thrusting upon the insurer a risk greater than it agreed to assume is not present in this case.

The District Court entered judgment against Michigan for the balance due Co-op under the contract as written. We submit the judgment was correct and therefore should be affirmed.

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APPENDIX A

STANDARD PROVISIONAL STOCK FORM ANNUAL SETTLEMENT

Selling Price Basis.

1. On stock consisting of grain and seeds, stock in process, finished stock and all other merchandise and supplies, not otherwise insured and not more hazardous, handled or used by the insured in their business, their own, or held by them in trust, or on storage if in case of loss the insured is legally liable therefor; all while contained in the building or buildings as located and described in the "Schedule Endorsement" attached hereto, or while in or on cars or trucks within 100 feet of said buildings, except when carrier is liable.
2. It is understood that any specific amount of insurance named in this policy, or in certificates issued hereunder, and the first and subsequent annual premiums to be paid therefor are only provisional; and that the amount of insurance hereunder at any time on the stock described in Paragraph 1 shall be determined by the procedure outlined in Paragraph 5.
3. The insured expressly agrees to file with this insurer, or its designated agent, after the close of the insured's business upon the last Saturday of each month, and before a loss shall have occurred, a true statement in writing of the value (as defined in Paragraph 4) of the stock covered hereunder at each location described in the "Schedule Endorsement", as of the close of business on each Saturday of such month; and, if the insured so elect, such an amount in addition thereto as the insured shall estimate as sufficient to cover errors or omissions in ascertaining such value; and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder.

4. It is agreed that wherever the term "Stock" is used in this form it shall be held to include all property covered hereunder as described in Paragraph 1 hereof. It is further agreed that wherever the term "Value" is used in this form it shall apply in the manner set forth in sections (4a), (4b) and (4c) below at the location and at the time when such ascertainment of value is required by the conditions of this policy:
- (4a) The value of stock, other than that manufactured by the insured, held for local or retail sale or for manufacturing purposes shall be the cost of replacing such stock.
 - (4b) The value of stock, other than that manufactured by the insured, held for shipment shall be the established cash shipping value of stock of like grade and quality.
 - (4c) The value of stock manufactured by the insured shall be the average carlot selling price.
5. The amount of Insurance under this form, at any time, at any location described in the "Schedule Endorsement", shall be determined by following the formula set forth in Sections 5A, 5B, 5C and 5D.

Section 5A. As of the time at which insurance in force is to be determined, ascertain the value, as defined in Paragraph 4, in such location.

Section 5B. Deduct from this value the amount of any non-provisional insurance against the hazards covered hereunder on said stock.

Section 5C. If through error, omission or otherwise the statement of value last filed by insured in accordance with the provisions of Paragraph 3 shall be less than the actual value as ascertained upon the same Saturdays for which said statement of value was filed, the amount as determined by Sections 5A and 5B shall be further reduced by the difference between the average of value so filed (including estimated

amount, if any) and the average of actual values as ascertained for the same Saturdays.

Section 5D. 1. If the amount determined by Sections 5A, 5B and 5C is less than the "Limit of Insurance" named in the "Schedule Endorsement", at such location, the amount thus determined shall be the "Amount of Insurance under this form".

2. If the amount determined by Sections 5A, 5B and 5C is equal to or greater than the "Limit of Insurance" named in the "Schedule Endorsement" at such location, the amount of the "Limit of Insurance" so named shall be the "Amount of Insurance under this form".

6. It is understood, however, that the amount of insurance under all policies covering under this form at each location shall not exceed the sum set opposite such location under the heading "Limit of Insurance"; and that the proportion of such insurance covered under this policy shall be the percentage of such insurance set opposite such location under the heading "Percentage of Insurance Under This Policy"; and in no event shall such proportion exceed the sum set opposite such location under the heading "Limit of Liability Under This Policy".
7. The premium earned under this policy shall be determined and an adjustment thereof made on each anniversary date hereof, or upon termination or cancellation of this policy based on the average of values filed with this insurer, or its designated agent, as required in Paragraph 3; but no premium shall be charged on any values in excess of the amount named as the "Limit of Liability Under This Policy", nor on any value protected by non-provisional insurance against the hazards covered hereunder reported in accordance with Paragraph 3.
8. It shall be the privilege of the insured to make any changes desired by him in the last previously filed

statement required in Paragraph 3 but such changes shall not be effective unless made in writing and filed with this insurer or its designated agent before a loss shall have occurred.

9. It is agreed that in the event of a loss a premium for the unexpired portion of the policy year based upon the amount of loss paid hereunder shall at once be due and payable.
10. Subject to all the terms and conditions of this policy, loss, if any, to be adjusted with the insured named herein and payable to the insured or order endorsed hereon for purposes of collateral security; but this insurance is void as to any subsequent owners or purchasers of the stock described herein.
11. This insurance shall not inure in any event to the benefit of any carrier.
12. This insurance does not cover storage or elevator charges.
13. The liability of this company for any or all of the hazards covered under this policy shall not exceed the amount stated in this policy and shall be subject to all of the terms and conditions specified herein.
14. **CO-INSURANCE CLAUSE:** In consideration of the acceptance by the insured of the following Co-insurance Clause a reduction from the established premium rate of \$.....to \$..... has been allowed on this insurance:
In consideration of the rate and/or form under which this policy is written it is expressly stipulated and made a condition of this contract that the insured shall at all times maintain contributing insurance on each item of property insured by this policy to the extent of at least 100% of the actual cash value at the time of the loss, and that failing to do so, the insured shall to the extent of such deficit bear his, her or their proportion of any loss.
15. If this policy be divided into two or more items as shown by the Schedule Endorsement attached here-

to, all the foregoing conditions and limitations shall apply to each item separately.

16.
17.
18.
19.
20.
21.

Attached to and made part of policy No. 133021 of the MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, Lansing, Michigan

Dated May 1, 1943 (GT) B. L. HEFLER

Agent

Selling Price Basis Form No. 156 M.M.F.P.B. 4-41



In the United States
COURT OF APPEALS
for the Ninth Circuit

MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,

Appellant,

-VS-

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a co-operative corporation,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from United States District Court for the State of Oregon.

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FILED

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PAUL R. O'BRIEN,

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In the United States
COURT OF APPEALS
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MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, a corporation,

Appellant,

-vs-

GRANGE OIL COMPANY OF LINN AND BENTON COUNTIES, a co-operative corporation,

Appellee.

REPLY BRIEF OF APPELLANT

Appeal from United States District Court for the State of Oregon.

ARGUMENT

The appellee devotes considerable of its brief to the question whether under the law of Oregon the false statement of value filed by the appellee constituted a breach of warranty. We did not contend in our brief that the over-statement of the amount of specific insurance in the statements of value filed by the appellee

constituted a breach of warranty which worked a total forfeiture of the policy. We did contend, however, that the proper interpretation of the policy requires that effect be given to paragraph 3 of the standard provisional stock form (T. 58) which expressly provides "and the insured shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

Appellant has never contended that appellee was guilty of a breach of warranty which worked a forfeiture of the policy; if such had been its position it would never have paid the substantial sum of money to appellee that it did. Rather, appellant from the time it first submitted proof of loss to the appellee has consistently and without equivocation maintained the position that the erroneous reports of specific insurance resulted in "under-reporting of values" within the meaning of the "honesty clause," Section 5C. Thus, the case is brought squarely within the rule of *Wallace v. World Fire and Marine Insurance Company*, 70 F. Supp. 193, aff'd 166 F. (2d) 571, that where the insurer has protected itself from loss on account of erroneous reports by means of an "honesty clause" there is no basis for a forfeiture on account of such reports. If, however, the court were to hold in this case that appellant was not protected by its "honesty clause," the overstatement of the specific insurance immediately becomes a breach of a promissory warranty material to the risk to the extent of the overstatement. (*Atlantic Fruit Company v. Hamilton Fire Insurance Company of New York*, 251 N.Y. 98, 167 N.E. 184.)

Counsel for appellee have suggested that we have now departed from the original construction of the loss formula, Sections 5A, 5B, 5C, and 5D, which the adjuster for appellant used in tendering Proof of Loss to appellee to be executed and that we are now proposing a different construction on this appeal (Appellee's Brief 6). This is not so, and we assume that this unintentional error will be corrected by appellee after reference to their records without the need of filing a supplemental transcript to include plaintiff's exhibit 6, which is the Proof of Loss above referred to (T. 39).

Appellee has commented at length upon the defenses raised by appellant on the trial of this case in the District Court. Suffice to say that on this appeal we have elected to present to the Court for determination the fundamental and primary issue of whether or not appellant's policy and loss formula are to be construed according to the plain language of their content and the intent of both parties to the contract. That a contract should be construed so as to effect the intent of the parties to it is basic law. In this case the appellee through its manager admitted on the trial of the case that it had intended to have the disputed portion of this loss insured in another company (T. 90, 92). In fact, it went to great length to establish this point in order to show that there was no actual fraud involved. The fact that the appellant never intended to insure this portion of the loss is conclusively shown by defendant's exhibit 24 (T. 43) which is the provisional ledger sheet recording posted values covered under the policy. A comparison of this ledger sheet with the summary of

reports of values on Plant 2 (T. 45) will disclose that in every entry the amount of specific insurance reported was deducted before posting. The ledger sheet is the basis for computing premium earned (T. 126). Thus, there was at no time prior to the subject loss an intent by either party to have the disputed portion of the loss covered under the provisional policy.

While technically paragraph 3 is not a warranty whose breach completely avoids the policy, it is highly relevant in determining what is meant by the words "the statement of value" as used in Section 5C (T. 49).

The appellee correctly interprets our argument (appellee's Brief 18) as being that the language of Section 5C uses the words "statement of value last filed" as referring to the statement described in Section 3. Section 5C expressly defines the "statement of value last filed by insured *in accordance with the provisions of paragraph 3.*" Turning to paragraph 3 we find the requirement, mandatory in nature, that "the insured *shall* also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder." The words "in accordance with the provisions of paragraph 3" appearing in Section 5C indicate that the words "the statement of value last filed by insured" refers to a document and not merely to a defined value. The definition of "value" in Section 4 appears by reference to Sections 4A, 4B and 4C to mean that where the word "value" is used in the sense of the "Value of stock" then such value shall be determined by the definitions contained in Sections 4A, 4B and 4C.

Section 5C does not simply use the word "value" standing alone, in which event it could be argued that the definition limits its meaning, but "value" is used in combination with important words preceding and following it, that is, "*the statement of value last filed by insured in accordance with the provisions of paragraph 3.*" It is a well-established rule that all portions of an instrument shall be considered in interpreting its meaning. The definition of the one word "value" must give way to the context of that word ("statement of") and the subsequent definition of just what "statement of value" is intended by Section 5C.

The context of the use of the word "value" in Section 5C not only permits, but requires, the words "statement of value" to mean a document which, by the last clause of paragraph 3, "shall also include in such statement the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

To put the matter another way (which we attempt because appellee on page 18 of its brief says "for some reason not made clear to us Michigan contends, however, that Section 5C entitles it to a further deduction in computing the amount of insurance"), we again call the Court's attention to the fact that 5C refers not simply to "value," which is the word which is defined, but also uses the modifying words "the statement of" value. Now, the word "statement" is in effect itself defined. "Statement" is defined by paragraph 3 to "include" the "amount of any non-provisional insurance on said stock." Section 5C does not leave to inference that it is this type

of a statement which Section 5C means, but 5C refers back to paragraph 3 and says that the "statement of value" which 5C is talking about is "the statement of value last filed by insured *in accordance with the provisions of paragraph 3.*"

Paragraph 7 buttresses our contention that the amount of specific insurance is an integral and important part of the statement required by paragraph 3 and mentioned in Section 5C. While it provides that the premium shall be determined "on the average of values filed with this insuror * * * as required in paragraph 3" it reduces the premium by further providing "but no premium shall be charged * * * on any value protected by non-provisional insurance against the hazards covered hereunder reported *in accordance with paragraph 3.*"

Section 8 of the form (T. 61) also supports our contention that the "statement of value last filed by insured in accordance with the provisions of paragraph 3" means it includes not only the statement of the value of stock, but also the statement of the amount of any non-provisional insurance on said stock. This is true because Section 8 gives the privilege to the insured "to make any changes desired by him in the last previously filed statement required in paragraph 3 but such changes shall not be effective unless made in writing and filed with this insuror or its designated agent *before a loss shall have occurred.*" The words "any changes" refer not simply to the value of stock but also to (a) an estimate sufficient to cover errors or omissions in ascer-

taining the value of stock and also (b) an amount of any non-provisional insurance. *Section 8 thus recognizes that the "statement of value" required by paragraph 3 covers something more than simply stock values.*

That the parties treated the statement of specific insurance as an important and integral part of the true statement required by Section 3 is shown by the reporting form (T. 44) which included the statement that "Following is a true statement of the actual cash values of all stocks * * * and all Non-Provisional Fire Insurance on such stock."

Furthermore, this statement recites the insured's understanding that in determining the amount of insurance the "non-provisional insurance, if any" shall be deducted.

The appellee argues (p. 23) that "there is good reason for Michigan to have concluded that it should insist on complete accuracy in the reporting of the value of stock of the goods while being less strict about an amount of specific insurance." Since the premium to be paid to the insurer and also the amount of insurance in force also depend upon the amount of specific insurance reported there is no reason whatever for the insurer to be less strict about the report of the amount of specific insurance than about the value of the stock of goods. The truth is that the "easy" ascertainment of the amount of specific insurance, mentioned by the appellee (p. 23), is all the more reason for insisting

upon the accurate reporting of the amount of specific insurance.

The appellee's argument is really a boomerang. The ease with which the appellee could ascertain the amount of the specific insurance is the more reason for requiring an accurate statement than if the fact reported related to a matter of opinion. At the same time the unlikelihood of an insured making either a fraudulent or an unintentional misrepresentation of the amount of specific insurance justified the insurer in not spelling out with elaborate provisions the result of an overstatement of specific insurance.

Whether fraudulently or innocently misstated, the overstatement of the amount of specific insurance does under paragraph 7 result in reducing the premium actually charged to the insured. While the appellee argues (p. 24) that "Michigan clearly has the right to collect whatever premium may be due it under the provisions of Section 3," the only right appellee refers to is a suit for damages for a breach of contract, and in this case the appellee offers to pay whatever premium is due. After loss, this is indeed a mild concession!

The appellee contends that an honest mistake must be treated differently under the contract than a fraud case. This contention, however, does not authorize warping the language of the contract to give insurance to the appellee for which it did not pay, on the theory that it was innocent of wrongdoing. The result of an overstatement of specific insurance has exactly the same result in reducing the premium whether such over-

statement is fraudulent or merely careless. Also, Section 3 gives to the assured the right to include in its true statement an estimated amount sufficient to cover errors or omissions and thus provides it with a means to protect itself against the consequence of an honest mistake.

In interpreting the policy, therefore, the Court should consider, we submit, that neither of the parties to the insurance contract intended that the insured should have insurance for which, under the reports filed, it was not paying a premium.

The reference on page 36 of the appellee's brief to the policy limit of \$145,000 is misleading. In an ordinary fire policy when one refers to the limit he refers to the amount of insurance for which the company is receiving a premium. The connotation which the appellee seeks to denote by the use of the phrases "the limits of liability assumed by Michigan" and "the limits of Michigan's risk that it agreed to assume on this property," on page 36 of its brief, is that the insurer was being paid for insurance beyond the loss claimed. Such connotation is a false one. In the present case the amount of the premium is *not determined by the limit of liability* to which the appellee refers, but is determined by the "statement of values" defined and specified in Section 3 of the standard provisional stock form which specifically includes "the amount of any non-provisional insurance on said stock against the hazards covered hereunder."

We submit that a fair reading of the entire form indicates that the words of Section 5C "the statement

of value last filed by insured in accordance with the provisions of paragraph 3" mean a document which by the express provision of paragraph 3 includes both the value of the stock and "the amount of any non-provisional insurance on said stock." Therefore, the overstatement of specific insurance in this statement results under Section 5C in a reduction of the amount of insurance available to the appellee.

It is apparent from the tenor of appellee's brief that it has resorted to juxtaposition of other inapplicable clauses of the policy in an attempt to create an ambiguity, where in fact there is none, for the purpose of invoking the familiar rule of construction of insurance policies in favor of the insured. The Oregon court has succinctly stated the rule applicable to this case in *Clark Motor Co. v. United Pacific Insurance Co.*, 172 Or. 145, 139 P. (2d) 570, as follows:

"An insurance policy, like any other contract, is to be construed in accordance with the intention of the parties which is to be ascertained from the entire agreement. The policy must be viewed by its four corners. All parts and clauses must be construed to determine if and how far one clause is modified, limited, or controlled by others. Any reasonable doubt as to the meaning of the policy must be resolved in favor of the insured."

Application of the above rule is all we ask. There is no ambiguity in the duty of insured to report truly its specific insurance under the terms of Section 3. There is no ambiguity in the prohibition of making changes in reports of values after a loss has occurred under the terms of Section 8. There is no ambiguity in the pro-

hibition under Section 7 of charging a premium on values reported covered by specific insurance. There is no ambiguity in the meaning of "statement of value" under Section 5C as referring to the reports of values of stocks and of specific insurance thereon. In view of the foregoing provisions and the admitted facts of this case, it is inescapable that there was an under-reporting of values in the month of November within the meaning of Section 5C; therefore, according to the plain terms of that section, the amount of provisional insurance in effect at the time of the loss was further reduced by the amount that the specific insurance had been over-reported in November, 1946. To hold otherwise would render meaningless each of the terms of the policy above referred to.

The appellant having paid the full liability as determined from the insured's own reports of the amount of specific insurance, ought not to be required to pay an additional sum of insurance for which it would not have received any premium. The judgment below should therefore be reversed.

Respectfully submitted,

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